Before the World Trade Organization
Panel Proceedings

Canada – Measures Governing the Sale of Wine

(DS537)

First Written Submission of Australia

10 May 2019
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### Glossary of Abbreviations and Acronyms

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I. INTRODUCTION

1. This dispute arises from a range of Canadian measures governing the sale of wine, which discriminate against imported wine. The challenged measures exist at the federal level and in the provinces of Ontario, Nova Scotia and Quebec.

2. It is a cornerstone principle of the multilateral trading system, reflected in Article III of the General Agreement on Tariffs and Trade 1994 (GATT 1994), that a Member must not discriminate against importing producers and products to benefit its local industries and products. This "national treatment" obligation lies at the heart of the present dispute. As Australia will demonstrate in this submission, the challenged measures give an unfair competitive advantage to domestic wine, inconsistent with this core obligation of the GATT 1994.

3. The measures at issue in this dispute can be broadly grouped into three types.

4. First, discriminatory fiscal measures that indirectly impose a higher tax on bulk imported wine as compared to domestic wine. Those measures violate Article III:2, which prohibits discriminatory internal taxes or charges. Two measures contravene that provision. At the federal level, Canada exempts packaged wine produced from 100% Canadian ingredients from federal excise duty. In Ontario, wines sold in the winery retail store (WRS) system made from 100% local content are subject to a significantly lower wine tax than wines that include foreign content.

5. Second, measures that restrict or exclude the access of imported bottled wines to retail sales outlets in the grocery channel as compared to the access granted to domestic wine. Those measures violate Article III:4, which prohibits discriminatory internal regulation.

6. Two measures contravene that provision. Ontario has introduced measures permitting the sale of wine in grocery stores that exclude or restrict imported bottled wines from accessing grocery stores. These measures place certain conditions on the sale and display of wine in grocery stores that favour local wines over imported wines. Quebec has introduced measures that give Quebec small-scale wine producers wines direct access to sale in grocery and convenience stores, but do not permit like imported bottled wines to have the same access.
7. Third, discriminatory liquor board product mark-ups on wine that afford a reduced mark-up to domestic bottled wine as compared to imported bottled wine, in violation of Article III:2 or alternatively Article III:4. One measure of this kind is in issue, which is found in Nova Scotia.

8. There is little about this case that traverses new ground. The measures described above are familiar, being similar or analogous to measures that GATT and WTO Panels have previously found to breach GATT national treatment principles. The legal tests under Article III of the GATT 1994 are well established and the application of those tests to these measures is straightforward. These measures involve "textbook" violations of the national treatment obligation of the GATT 1994. They are measures that provide a competitive advantage to domestic wine that is not afforded to imported wine. In fact, the evidence demonstrates that the very raison d'être of the measures is to support the domestic wine industry over foreign competition. These are precisely the kinds of measures the drafters of Article III of the GATT 1994 were seeking to combat. They are contrary to the purpose of that article, which is to avoid protectionism in the application of internal tax and regulatory measures; specifically "to ensure that internal measures not be applied to imported or domestic products so as to afford protection to domestic production".

9. In this case, the relevant question is whether imported wine is afforded equal competitive opportunities to domestic wine. As the Appellate Body has consistently held, Article III protects "expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products". That is what the obligations in Article III seek to protect; to ensure a level playing field for imported products to compete with domestic products in the relevant domestic markets. This case seeks to hold Canada to those obligations.

10. Canada's regulatory regime governing the importation, distribution, sale and taxation of liquor, including wine, is highly regulated and complex. Regulatory responsibility for the importation, distribution and retail sale of liquor, including wine, rests with provincial governments. The provinces have established provincial liquor authorities that control the liquor market, including wine, in their respective provinces. All liquor, including wine, must be imported through these provincial liquor authorities, who exercise a monopoly on the importation, distribution and retail sale of liquor. Under this regime, retail sales of wine and the retail channels

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1 Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16.
through which wine can be sold in Ontario, Quebec and Nova Scotia are limited and tightly controlled by the provincial liquor authorities.

11. As Australia's case highlights, protectionist measures have been creeping back into the Canadian system both at the federal level and in numerous provinces. Australia is disappointed that, rather than working to eliminate discrimination in the regulatory regime for liquor sales, including wine, Canada, in particular through its provincial governments, appears to be increasing protectionist measures to support the local wine industry.

12. As Australia will demonstrate in this submission, while some discriminatory elements have been in place for some time, those barriers have been compounded in the provinces of Ontario and Quebec, which have recently implemented selective "deregulation" of wine retail sales by permitting wine sales in grocery stores in a way that preferences domestic wine. Deregulation of wine retailing in these provinces has clearly been designed to boost sales of domestic wine. The effect of these measures is to support the domestic wine industry and promote domestic wine while limiting retail sales opportunities for imported wine.

13. Australia is not questioning Canada's prerogative to regulate liquor sales, including through state trading enterprises. However, in so doing, Canada (including its provinces) must respect its WTO obligations and must not tilt the playing field in favour of domestic products. Through this dispute, Australia is doing nothing more than seeking equality of opportunities for imported wines to compete in the Canadian market, consistent with WTO rules.

14. These submissions are structured as follows:

a. Part II provides a factual overview of Canada's regulatory framework for liquor sales, and an overview of the distribution and sales systems for wine in each of the relevant provinces, Ontario, Quebec and Nova Scotia. Each of the challenged provincial measures sit within the overarching regulatory framework of each province.

b. Part III describes each of the challenged measures at issue in this dispute.

c. Part IV explains how the measures described in Part III are inconsistent with Canada's obligations under Articles III:1, III:2, Article III:4 of the GATT 1994.
II. FACTUAL BACKGROUND

A. THE WINE MARKET IN CANADA

15. For the purposes of this submission and the operation of the measures, Australia will make a distinction between two categories of wine that are imported into the Canadian market: imported bulk wine, which is generally imported in large volumes, and imported bottled wine, imported already packaged in the traditional glass bottle.

16. There are two types of wine that are primarily produced in Canada: 100% Canadian wine (which includes all Vintners Quality Alliance (VQA) wine) and wine blended in Canada from domestic and imported wine, generally known as International Canadian Blends (ICB wines)\(^3\). ICB wines are blended and bottled in Canada, and in some provinces must include some domestic content\(^4\). Imported wine that is imported in bulk (unpackaged) is included in ICB wines. This is clear from the fact that Canadian blended wines are required to identify on the label that they include imported wine by stating either "International blend from imported and domestic wine" or "International blend from domestic and imported wine"\(^5\). Only 100% Canadian wines are permitted to use the label term "Product of Canada" or "Canadian wine"\(^6\). Canada has a long history of blending domestic and imported wines\(^7\). Among larger wine producers in Canada there

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\(^4\) Canadian Blended Wine Industry and Labelling Overview, Exhibit AUS-2.


\(^6\) Update on the Blended in Canada wine labelling consultation, Exhibit AUS-3.

\(^7\) Canadian Blended Wine Industry and Labelling Overview, Exhibit AUS-2.
is a significant amount of production which involves bottling and blending of domestic and imported bulk wines. Smaller wineries in Canada typically produce wine from 100% Canadian grapes.

17. "VQA" wine stands for Vintners Quality Alliance wine. The Ontario VQA system exists to designate appellations of origin for wines made from 100% Ontario grapes. VQA Ontario is Ontario's wine authority responsible for administering Ontario's statutory appellation of origin system and standards under the Vintners Quality Alliance Act for wines made from Ontario grapes.

18. Canada's wine producing industry is not a major producer by global standards. It represented 0.5% of world wine production in 2015. This is in contrast to the world's top wine producers: Italy (17.43%), France (16.73%), United States (10.48%), Argentina (4.72%), Chile (4.54%) and Australia (4.19%) respectively, all of which are also the major exporters of wine to Canada. Australia is the fifth ranked country of origin in Canada's market behind wines from Canada, France, Italy and the US. Wine imports, both bulk and bottled, make up a significant part of the Canadian market. With respect to total wine imports to Canada, in the year ended June 2018, France had a 22% share of the market, Italy 21%, United States 21% and Australia 9%. Canada is Australia's fourth largest export market for wine, with Australia exporting $A208 million in wine to Canada in 2017-2018.

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8 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, G/STR/N/16/CAN, circulated 22 July 2016 (Canada's State Trading Notification), Exhibit AUS-5, p. 23.
14 Canada's major sources of wine, Exhibit AUS-1.
17 Wine Import Report, Exhibit AUS-10.
18 DFAT STARS Database, based on ABS Cat No 5368.0, September 2018 data.
B. OVERVIEW OF CANADA’S REGULATORY SYSTEM FOR LIQUOR DISTRIBUTION AND RETAIL SALES

1. General overview of the Canadian system

19. The Canadian liquor market, including for wine, is highly regulated and consists of a complex network of rules governing the importation, distribution and sale of wine that varies from province to province. Inter-provincial and international trade in alcoholic beverages is governed by the federal *Importation of Intoxicating Liquors Act* (IILA)\(^{19}\). Section 3(1) of the IILA bans importation or inter-provincial shipment of liquor except if the liquor has been purchased by the government of the province to which it is being transported or imported\(^{20}\). The IILA provides the provinces, within their respective jurisdiction, with control over the sale of intoxicating liquor, and over the importation, sending, taking or transportation of such liquor into the provinces\(^{21}\).

20. Provincial governments in Canada are therefore responsible for regulating and controlling the importation and sale of liquor within their jurisdictions\(^{22}\). The provinces have established provincial liquor authorities, under provincial legislation, to control liquor distribution and sales\(^{23}\). The provincial governments generally act as both a regulator and a participant in the market as a wholesaler and retailer of liquor, through these provincial liquor authorities. Under this regulatory structure, provincial liquor boards have a monopoly on the purchase, distribution and sale of alcohol, including wine\(^{24}\). This monopoly setting does not foster competition in the market. All liquor (including wine) imported into a Canadian province (including inter-provincial) must be imported through the relevant provincial liquor authority (as wholesaler), and is distributed for retail sale through these authorities.

21. Each province has developed its own regime for the delivery and sale of liquor at retail outlets within the province. Under this regime, retail sales of wine and the retail channels through which wine can be sold are limited and tightly controlled by the provincial liquor authorities\(^{25}\).

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\(^{19}\) *Importation of Intoxicating Liquors Act*, RSC 1985, c I-3, (IILA), Exhibit AUS-12; Canada's State Trading Notification, Exhibit AUS-5, p. 21.

\(^{20}\) IILA, Exhibit AUS-12.

\(^{21}\) Canada's State Trading Notification, Exhibit AUS-5, p. 21.

\(^{22}\) Canada's State Trading Notification, Exhibit AUS-5, p. 21.

\(^{23}\) Canada's State Trading Notification, Exhibit AUS-5, p. 21.

\(^{24}\) Canada's State Trading Notification, Exhibit AUS-5, p. 21.

\(^{25}\) Canada's State Trading Notification, Exhibit AUS-5, p. 21.
There is therefore limited retail competition in the market. The majority of Canadian provinces operate government-owned liquor stores that retail imported and domestic liquor, including wine, which is generally the main retail channel for imported wine sales. Some provinces allow wine to be sold through a limited number of privately owned and operated retail stores as well as on-site at wineries. These retail channels are described in more detail for each of the relevant provinces in sections II.B.2 to II.B.4 below.

22. This regulatory structure creates a highly complex system that is restrictive. Moreover, the monopoly granted to the provincial liquor authorities over the importation and sale of foreign alcoholic beverages has entrenched a high degree of protectionism of the domestic wine industry. For example, some of the provincial liquor authorities also have a mandate to support and promote domestic products, and they actively pursue policies and practices to support local products, notwithstanding that at the same time they have regulatory responsibility for the importation and sale of wine within the province. The Liquor Control Board of Ontario (LCBO) has stated that a key part of its mandate is to promote Ontario products including wine; and the Nova Scotia Liquor Corporation (NSLC) has a legislative mandate to "promot[e] industrial or economic objectives regarding the beverage alcohol industry in the province" and lists one of its responsibilities as "cultivating the success of local products and the industry".

23. The retail sales price of imported wine sold internally in the provinces is established by adding to the landed cost (invoice price, federal customs and excise duties and taxes, and freight), the applicable provincial mark-ups, and sales taxes. These mark-ups vary by jurisdiction. In some provinces the mark-up includes an element of profit to the liquor authorities (i.e. it is not simply a cost recovery charge).

2. **Ontario**

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27 Liquor Control Act, RSNS 1989, c 260, (NS LCA), Exhibit AUS-14, s. 4.


29 See, e.g. SAQ Annual Report 2018, Exhibit AUS-16, p. 33.
24. Wine produced in Ontario comprises three groups:31

- Ontario VQA, a designation that signifies that the wine is made from 100% Ontario-grown grapes and adheres to certain standards;
  - The *Vintners Quality Alliance Act* (VQA Act) defines VQA wine as 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; ("vin de la Vintners Quality Alliance")32.

- International Canadian Blended (ICB), a blend of Ontario and imported (bulk) 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.

25. The LCBO and the Alcohol and Gaming Commission of Ontario (AGCO) are the two government bodies responsible for controlling the manufacture, movement and sale of liquor within the province, respectively through the *Liquor Control Act* (Ontario LCA)33, and the *Alcohol, Cannabis and Gaming Regulation and Public Protection Act* (ACGRPPA) (formerly the *Alcohol and Gaming Regulation and Public Protection Act*)34. The *Liquor Licence Act*35 sets the conditions under which a person may keep for sale, offer for sale, or sell liquor under a licence or permit issued under the Act.36

26. 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. All liquor sold by the LCBO must meet its listing criteria and gross profit quotas.37

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32 *Vintners Quality Alliance Act, 1999*, SO 1999, c 3, (VQA Act), Exhibit AUS-18, s. 2.


34 *Alcohol, Cannabis and Gaming Regulation and Public Protection Act, SO 1996 c 26, (ACGRPPA)*, Exhibit AUS-20.


36 Canada's State Trading Notification, Exhibit AUS-5, p. 27.

37 Canada's State Trading Notification, Exhibit AUS-5, p. 28.
27. The LCBO is the route to market for most wines and liquor sold in Ontario. All imported wine, or wine from other Canadian provinces, must be imported through the LCBO.

28. Prior to the introduction of the new Ontario grocery measures following the Ontario Premier's Advisory Council on Government Assets (PAC) review (described in section III.B.1 below), wine was not permitted to be sold in grocery stores in Ontario. Wine was sold through two primary retail channels: 1) the government owned LCBO stores and; 2) a network of "Winery Retail Store" (WRS) outlets.

29. LCBO stores were the only channel for the retail sale of imported bottled wine. Domestic bottled wine is also sold in LCBO stores. Ontario wine is heavily promoted in LCBO stores, with the LCBO openly stating that a key part of its mandate is "the promotion of Ontario products" and that one of its "key strategic objectives" is "grow[ing] the sales of local Ontario products". The LCBO pursues various initiatives to promote local wine in the LCBO stores including funding, advertising and promotional activities for local wines, a major annual promotion, and providing local wines with more prominent shelf space and location in LCBO stores on premium high-quality fixtures.

30. The other primary retail channel in Ontario for the sale of wine, 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). 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). This requires the manufacturer to,
inter alia, carry out at least one "significant winemaking step" with respect to the full content of each bottle of wine produced, which includes blending\(^46\). Ontario regulations also require that blended wines (ICB wines) manufactured in Ontario must have at least 25% Ontario content\(^47\). As a "significant winemaking step" includes blending, a manufacturer of ICB wine could use 25% wine made from Ontario grapes and blend it with up to 75% imported bulk wine. The effect of these requirements is to confine the WRS system to wine that is made in Ontario by an Ontario manufacturer that has at least 25% Ontario content\(^48\). While this may include ICB wine with up to 75% imported content, it excludes all imported bottled wines from WRS outlets, because by definition imported wines bottled outside Ontario would not be made by a manufacturer in Ontario or include any Ontario content.

3. **Quebec**

31. The purchase, distribution, and sale of alcohol in Quebec is controlled by the provincial liquor authority Société des alcools du Québec (SAQ) established under the *Act respecting the Société des alcools du Québec*\(^49\) (SAQ Act). The SAQ is responsible for distribution and sale of alcohol in Quebec\(^50\).


\(^{47}\) See *General Regulation*, RRO 1990, Reg 717, ss. 3-4. Section 4 provides that a manufacturer may sell only "Ontario wine produced from fruit grown in Ontario" and "wine manufactured in accordance with the *Wine Content and Labelling Act, 2000*". The *Content of Wine Regulations O Reg 659/00, under the Wine Content and Labelling Act, 2000 SO, 2000, c 26*, provides that a bottle of wine manufactured in Ontario by combining grapes grown in Ontario with imported grapes shall have no less than 25% of grapes grown in Ontario (section 2(2)) i.e. at least 25% Ontario content is required in blended wine manufactured in Ontario. See *Winery Retail Store Excerpts*, Exhibit AUS-25. See also, *PAC Report*, Exhibit AUS-17, p. 6, which notes that ICB wines are a "blend of Ontario and imported wine that must have at least 25% Ontario grape content in each bottle."

\(^{48}\) See also Canada's State Trading Notification, Exhibit AUS-5, p. 28 which notes that authorized retailers in Ontario include "manufacturers' retail stores (winery stores on- and off-site...) authorized under the AGRPPA to sell exclusively their domestic products."


\(^{50}\) Canada's State Trading Notification, Exhibit AUS-5, p. 29.
32. The SAQ distributes alcoholic beverages through two major retail channels: 1) a network of government-owned and operated SAQ stores; and 2) a network of over 9,000 grocery and convenience stores51.

33. In 2016, the government-owned SAQ stores, comprising 406 government stores and 438 agency stores52, accounted for about 86% of the total retail wine sales in the province53. For all imported wine sold through its stores, the SAQ is the importer of record, the wholesaler, provider of warehouse services, distributor and retailer54.

34. The second main retail channel for wine sales in Quebec is through grocery and convenience stores. Prior to the introduction of the Quebec grocery measures (discussed in section III.B.2 below) only a certain type of wine that was bottled in Quebec could be sold in the grocery channel55. Under the SAQ Act, wines bottled in Quebec by holders of an industrial "wine maker’s permit" could be sold in the grocery channel56. This wine includes "table wine"57, that is bottled by these permit holders under their own (proprietary) private label brands for sale in grocery and convenience stores58. This can include wine that is imported in bulk and bottled in Quebec by the holder of the wine maker’s permit59. Imported bottled wine (bottled outside Quebec) is not permitted to be sold in this channel (as it is not bottled in Quebec by a permit holder). The SAQ is the importer of record for wine imported in bulk for bottling. Once bottled by the Quebec bottling company, the wine is transported into the SAQ60 warehouses and from there distributed by the

51 Canada's State Trading Notification, Exhibit AUS-5, p. 29.
54 Canada's State Trading Notification, Exhibit AUS-5, p. 29.
55 Canada's State Trading Notification, Exhibit AUS-5, p. 29. Regulation respecting wine and other alcoholic beverages made or bottled by holders of a wine maker's permit, RSQ, c S-13, r 7, (Bottling Regulation), Exhibit AUS-28, ss. 1 and 2.
56 SAQ Act, Exhibit AUS-26, ss. 24 and 27; Bottling Regulation, Exhibit AUS-28, ss. 1 and 2; Regulation respecting the terms of sale of alcoholic beverages by holders of a grocery permit, c S-13, r 6, (Grocery Permit Regulation), Exhibit AUS-29, s. 2, which sets out the alcoholic beverages that a grocer is permitted to sell.
57 USDA GAIN Report, Exhibit AUS-27, p. 5.
58 USDA GAIN Report, Exhibit AUS-27, p. 4; See Grocery Permit Regulation, Exhibit AUS-29, s. 2(3) -4 ; and Bottling Regulation, Exhibit AUS-28, ss. 5 and 6.
59 Bottling Regulation, Exhibit AUS-28; USDA GAIN Report, Exhibit AUS-27.
60 See SAQ Act, Exhibit AUS-26, s. 27.
SAQ to individual groceries and convenience stores. The SAQ mark-up is applied to all wine sold through this method.

35. Typically, wine distributed through the SAQ network, through both SAQ stores and grocery and convenience stores (as described in the above paragraph), attracts the following SAQ fees and mark-ups:
   - a "frais de service" charge - cost to use SAQ warehousing and distribution; and
   - SAQ product mark-up applied to the cost price of the wine - in 2018 it was 41.1% of the retail price. This covers "selling, merchandising, distribution and administrative expenses and generates net income", i.e. it is not simply a cost recovery charge, as it also includes revenue raising.

4. Nova Scotia

36. The Nova Scotia Liquor Corporation (NSLC) is the sole importer of beverage alcohol into Nova Scotia. It is a Crown corporation and has the power under the Liquor Control Act to, among other things, control the possession, sale, transportation and delivery of liquor. All domestic and imported alcohol is required to be supplied through the NSLC distribution system. The NSLC runs all retail outlets selling liquor in Nova Scotia (103 retail stores), except for 60 "Agency Stores" which are authorized by the NSLC to sell liquor and four Private Wine and Specialty stores in Nova Scotia (that offer selections not found in NSLC stores).

37. The Liquor Control Act gives the NSLC the authority to set liquor pricing in Nova Scotia. The NSLC applies "mark-ups" on products, including all wines, that are sold through NSLC

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61 USDA GAIN Report, Exhibit AUS-27.
62 USDA GAIN Report, Exhibit AUS-27.
63 SAQ Fraise de Service spreadsheet, 27 May 2018, Exhibit AUS-30.
64 SAQ Annual report 2018, Exhibit AUS-16, p. 33. (emphasis added)
65 Canada's State Trading Notification, Exhibit AUS-5, p. 27.
66 NS LCA, Exhibit AUS-14, s. 12.
67 Canada's State Trading Notification, Exhibit AUS-5, p. 27.
68 Canada's State Trading Notification, Exhibit AUS-5, p. 27.
69 NS LCA, Exhibit AUS-14, s. 42.
The discriminatory mark-up on domestic wine compared to imported wine (discussed in section III.C below) is one of the measures the subject of this proceeding.

C. NEW GROCERY STORE CHANNEL FOR SALE OF WINE

38. As described for the relevant provinces above, retail sales channels through which wine can be sold is restricted to certain retail outlets. Until recently, wine was not permitted to be sold in grocery stores in Ontario and was restricted in Quebec. Under new measures, that are challenged in this case, both Ontario and Quebec have expanded the sale of wine in grocery stores. This is central to the contraventions of Art III:4 of the GATT 1994 that are alleged in this case.

39. By offering convenience to consumers, the grocery sales channel will be a highly lucrative and profitable sales channel for wine that can be expected to grow sales of wine. For example, a study on the effect of the introduction of wine in grocery stores in New Zealand in the 1990s found that wine sales increased significantly and there was a shift in sales from liquor stores to grocery stores. Similarly, in the United States where some states permit wine sales in grocery, reporting indicates that in 2014, 42% of all store bought wine was purchased in supermarkets.

40. The grocery sales channel has a key competitive advantage over other retail sales channels (such as stores that sell only liquor). This is through convenience to consumers, i.e. "one stop" shopping, which is a key factor in consumer purchasing decisions. In Ontario, the PAC review that led to the adoption of regulations permitting the sale of wine in grocery stores highlighted that a key benefit of expanding access to the grocery retail channel was "significantly improved convenience" for consumers in purchasing wine. Consequently, limitations on imported wine

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70 Canada's State Trading Notification, Exhibit AUS-5, p. 27.
73 For example, this was recognised in the British Columbia Ministry of Justice, *B.C. Liquor Policy Review Final Report*, Exhibit AUS-33, p. 15, which noted that "[a]s with all retail markets, convenience is a key convenience point for consumers."
74 PAC Report, Exhibit AUS-17, p. 3.
access to grocery stores, while providing preferential access to domestic wine, would have a significant impact on competitive opportunities for imported wine.

III. MEASURES AT ISSUE

41. The measures the subject of Australia's claim exist at the federal level and in three provinces. For the purpose of both the factual description and legal analysis they can be broadly grouped as follows: i) discriminatory fiscal measures (the federal excise exemption and the Ontario wine tax); ii) measures that restrict or exclude the access of imported bottled wines to retail sales outlets in grocery (in Ontario and Quebec) and iii) discriminatory liquor board mark-ups on wine (Nova Scotia). Each group of measures is challenged with respect to either imported bulk wine or imported bottled wine. The fiscal measures described in i) are challenged with respect to imported bulk wine, while the measures identified in ii) and iii) are challenged with respect to imported bottled wine.

A. DISCRIMINATORY FISCAL MEASURES

1. Federal – excise duty exemption for Canadian wine ("Federal excise exemption")

42. Excise duty on wine in Canada is regulated at the federal level and imposed by the federal *Excise Act 2001* \(^{75}\) (FEA). Wine is subject to duty in two scenarios. Bulk wine, defined as wine that is "not packaged" \(^{76}\), is subject to duty under subsection 134(1) of the FEA when it is "taken for use"; that is, "consume[d], analyse[d] or destroy[ed]" or used for "any purpose that results in a product other than alcohol" \(^{77}\). Wine "packaged in Canada" \(^{78}\), including ICB and privately bottled wine for beverage consumption, is levied under subsection 135(1). Duty under this scenario is imposed on bottled or packaged wine. However, since bulk wine destined for retail sale must be

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\(^{75}\) *Excise Act, 2001, SC 2002 c 22, (FEA), Exhibit AUS-34.

\(^{76}\) FEA, s 2, Exhibit AUS-34, s. 2.

\(^{77}\) FEA, Exhibit AUS-34, s. 2.

\(^{78}\) FEA, Exhibit AUS-34, s. 2.
packaged in order to be sold in the Canadian market, it effectively attracts excise under subsection 135(1) at the point of packaging.

43. Australia’s claim relates to the scenario regulated by subsection 135(1). Australian bulk wine exported to Canada is predominantly used by Canadian wine producers to make blended and privately bottled beverage wine. Privately bottled wine refers to wine imported in bulk and bottled under private labels in Quebec. Blended wines, generally referred to as ICB wine, are bottled wines produced by blending imported and local bulk wine. As noted above, blended wines have a long history in domestic Canadian production and form a large proportion of the product offering by Canadian wineries and wine producers.

44. Excise duty on packaged wine is levied "at the time the wine is packaged" and is "payable by the person who is responsible for the wine immediately before it is packaged" – normally the wine licensee. Applicable rates of duty are set out in Schedule 6 of the FEA. Since 2017, these rates have been indexed to the Consumer Price Index and increased annually. As at May 2019, wine containing more than 7% per litre absolute alcohol is levied at C$0.653/litre. The next rate adjustment will occur on 1 April, 2020.

45. Despite the general scope of subsection 135(1), not all wine packaged in Canada is subject to excise. The FEA contains a number of excise exemptions including a general exemption for 100% Canadian wine which is the subject of Australia’s claim. This exemption was introduced in 2006 at the time the Canadian government implemented an increase in the federal excise tax. To

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79 USDA GAIN Report, Exhibit AUS-27, pp. 4-5.
80 Canadian Blended Wine Industry and Labelling Overview, Exhibit AUS-2.
81 Canada's State Trading Notification, Exhibit AUS-2.
82 FEA, Exhibit AUS-34, s. 135(3).
83 FEA, Exhibit AUS-34, s. 135(4).
84 Note that under s. 135(3), excise is payable at the time of packaging unless the "wine is entered into an excise warehouse immediately after packaging". If the wine is entered into an excise warehouse, duty is payable by the warehouse licensee and does not have to be paid until the packaged wine is removed from the warehouse in accordance with s. 136(1) of the FEA. Wine licensees are often also excise warehouse licensees i.e. wine producers hold both licences: Canada Revenue Agency, Excise Duty Memorandum 4.1.1 Producers and Packagers of Wine, June 2014.
85 FEA, Exhibit AUS-34, s. 135.1(2). See also, Government of Canada, Excise Duty Rates.
86 Excise Duty Rates, Exhibit AUS-36, p. 2.
87 FEA, Exhibit AUS-34, s. 135.1(2).
assist Canadian wine producers\(^88\), the Canadian government initially proposed to exempt from duty the first 500,000 litres of wine produced and packaged in Canada made from 100% Canadian agricultural products. However, after consultation with industry, the government decided to strengthen the benefit to Canadian producers by eliminating the 500,000 litre threshold and exempting all 100% Canadian wine from duty\(^89\). In adopting that policy, the Canadian government noted that:

> [e]xpansion of the relief will *help the competitiveness of vintners of 100 per cent Canadian wine* by reducing the excise duty on their product by 62 cents per litre (as of July 1, 2006). On a typical 750 ml bottle of wine, the relief will provide excise duty savings of 46.5 cents per bottle for producers of 100 per cent Canadian wines\(^90\). (emphasis added)

46. This amendment came into effect on 1 July 2006 and remains current law. Under section 135(2)(a) of the FEA, packaged wine "produced\(^91\) in Canada and composed wholly of agricultural or plant product grown in Canada" is exempt from excise duty.

47. This "100% Canadian rule" is elaborated in Canadian government publications as a requirement that all primary ingredients that are fermented must have been grown in Canada. This means that for wine produced from juice, all raw materials used to make the juice must have been grown in Canada. For wine blends, the final packaged product must be made wholly from Canadian agricultural products. Fortified wines must have been fortified with spirits made wholly from grains, fruits, and other agricultural products grown in Canada. Incidental agricultural-based ingredients added in the winemaking process (e.g. sugar) need not be of Canadian origin\(^92\).

48. Section 135 of the FEA accordingly constitutes a differential excise duty which formally operates in a discriminatory manner. ICB and privately bottled wines made from Australian bulk wine, or indeed any packaged wine containing inputs of non-Canadian origin, become subject to


\(^{89}\) Federal Excise Duty on Wine, Exhibit AUS-37; News Release 06-027, Exhibit AUS-38.


\(^{91}\) Section 2 of the FEA defines "produce" in relation to wine as "to bring into existence by fermentation".

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-duty under subsection 135(1) at the point of packaging in Canada. Moreover, that tax burden will increase commensurate with inflation every year. In contrast, wine made from 100% Canadian agricultural inputs, which is produced and packaged in Canada, attracts no duty whatsoever by virtue of the exemption under section 135(2)(a).

2. Ontario - Reduced wine basic tax rate for Ontario wines sold through the WRS system and wine boutiques ("Ontario wine basic tax")

49. The Ontario wine basic tax is imposed under section 27 of the ACGRPPA\(^93\) and is a component of a general "wine tax" levied on wine and wine coolers by the Ontario government\(^94\). Section 27 is specific in scope. It applies only to purchases from a winery retail store (WRS) or an authorized grocery store, which under Ontario regulations, means WRS or "wine boutiques" within authorized grocery stores.

50. "Winery retail stores" are described in section II.B.2 above and defined under the ACGRPPA as "a store in Ontario owned and operated by a winery from which the winery is authorized …to sell wine and wine coolers to purchasers"\(^95\). An "authorized grocery store" is defined as a "grocery store whose operator is authorized…to sell wine or wine coolers supplied from a wine boutique located inside the shopping area of a grocery store"\(^96\). Wine boutiques are described in detail in section III.B.1(b) below\(^97\) but, in essence, are off-site WRS outlets which have been allowed to relocate into grocery stores under new Ontario regulations.

51. As explained in sections II.B.2 and III.B.1(b), with a limited exception for gift packages and recent amendments allowing the sale of other wineries’ 100% Ontario wines\(^98\), wine sold

\(^93\) ACGRPPA, Exhibit AUS-20.
\(^94\) Ontario Ministry of Finance, "Beer and Wine Tax" [https://www.fin.gov.on.ca/en/tax/bwt/index.html], (Ontario Beer and Wine Tax), Exhibit AUS-40, p. 4. The "wine tax" also includes a "volume tax" and an "environmental tax".
\(^95\) ACGRPPA, Exhibit AUS-20, s. 17(1).
\(^96\) ACGRPPA, Exhibit AUS-20, s. 17(1). These are distinct from grocery stores who are authorized to sell wine under separate licences. These operators buy wine directly from the LCBO. Under s. 17(3) of the ACGRPPA, wine sold or sourced from the LCBO is exempt from wine basic tax.
\(^97\) The Ontario system of authorizations is explained in detail in section III.B.1 of this Submission. Briefly, wine can be sold in grocery stores in Ontario in two ways: either in a grocery store where that store owns a grocery authorization; or in a "wine boutique" located within a grocery store but operated by the wine manufacturer.
\(^98\) Note that under Ontario regulations, wine boutiques may now also sell certain other 100% Ontario wines. However, since these wines are purchased from the LCBO, they appear to be exempt from the wine basic tax under s. 17(3)(a) of the ACGRPPA.
through the WRS system must be "made by" the winery that operates the WRS or wine boutique. To satisfy this requirement, the winery must carry out the full primary fermentation process with respect to at least 25% of the total volume of wine sold by that manufacturer annually, and complete at least one significant winemaking step (which includes "blending") for each bottle of wine sold. Wine sold through this distribution channel is therefore limited to wines made by an Ontario manufacturer from 100% Ontario grapes (VQA and non-VQA wine) and ICB wine. ICB wines produced and sold locally must, under Ontario regulations, contain a minimum 25% Ontario grape content but can be blended with up to 75% imported wine.

52. As a result of these regulatory restrictions, the only way non-Ontario wine, including Australian wine, can access the WRS distribution channel is indirectly as bulk wine inputs to ICB products. Australia’s complaint accordingly centres on the indirect treatment of bulk wine under the wine basic tax.

53. The wine basic tax is calculated as a percentage of the retail price of purchased wine and then included in the final price paid by the purchaser at the point of sale. However, differential rates apply depending on product origin. For tax purposes, the ACGRPPA distinguishes between "Ontario" and non-Ontario wine. "Ontario wine" is relevantly defined in section 1(a) of the Liquor Licence Act as

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. (emphasis added)

99 Winery Retail Store Information Guide, Exhibit AUS-24, p. 3. See General Regulation, RRO 1990, Reg 717, ss. 3(1) and 3(2) extracted in Winery Retail Store Excerpts, Exhibit AUS-25.
100 Winery Retail Store Information Guide, Exhibit AUS-24, p. 4. Significant winemaking steps are limited to: Primary fermenting, blending, barrel aging, bulk aging, secondary fermentation (for sparkling wine), artificial carbonation (for sparkling wine) and flavouring (fortified wine).
101 See II.B.2 of this Submission, above.
102 ACGRPPA, Exhibit AUS-20, s. 27; Ontario Beer and Wine Tax, Exhibit AUS-40, p. 4.
103 Ontario Liquor Licence Act, Exhibit AUS-21.
which, in general, means wine made from 100% Ontario-grown produce\textsuperscript{104}. As shown in the table below, until 2016, 100% Ontario wines sold in WRS were taxed at a rate 10% lower than non-Ontario wines under the ACGRPPA.

54. In 2015, the PAC conducted a review of the wine and spirits retail and distribution system in Ontario\textsuperscript{105} and recommended an adjustment of tax rates on sales in the WRS system. This recommendation was adopted in the 2016 Ontario Budget and included: i) an increase in the wine basic tax on non-Ontario wine sales in WRS by one percentage point in each of June 2016, April 2017, April 2018 and April 2019; and ii) a commitment to higher wine basic tax rates for wine sales through wine boutiques in grocery stores\textsuperscript{106}. This was implemented through changes to the Ontario ACGRPPA.

55. The final increase was scheduled to occur on April 1, 2019. However, the Canadian government recently introduced legislation which, if passed, will pause the scheduled increases to the basic tax rates applicable to purchases of Ontario wine at wine boutiques and non-Ontario wine from WRS and wine boutiques\textsuperscript{107}. Therefore, subject to legislative approval, the wine basic tax rates set on April 1, 2018 will continue to apply until December 31, 2019\textsuperscript{108}. Current and historical tax rates applied under section 27 of the ACGRPPA to sales of Ontario and non-Ontario wine at WRS and wine boutiques are summarized below\textsuperscript{109}.

<table>
<thead>
<tr>
<th>Effective date (when the sale or distribution of the wine it [sic] made)</th>
<th>Wine basic tax (per cent of retail price of wine)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Ontario</td>
</tr>
<tr>
<td></td>
<td>At winery retail store</td>
</tr>
<tr>
<td>Before June 1, 2016</td>
<td>6.1</td>
</tr>
<tr>
<td>From June 1, 2016 to October 27, 2016</td>
<td>6.1</td>
</tr>
</tbody>
</table>

\textsuperscript{104} Ontario Beer and Wine Tax, Exhibit AUS-40, p. 5.
\textsuperscript{105} PAC Report, Exhibit AUS-17.
\textsuperscript{107} Bill 100, Protecting What Matters Most Act (Budget Measures), 2019 (Ontario), Sch 2 (Wine Basic Tax Amendment Bill), Exhibit AUS-43.
\textsuperscript{109} Ontario Beer and Wine Tax, Exhibit AUS-40, p. 5.
From October 28, 2016 to December 31, 2016 | 6.1 | 6.1 | 17.1 | 17.1
From January 1, 2017 to March 31, 2017 | 6.1 | 7.1 | 17.1 | 17.1
From April 1, 2017 to March 31, 2018 | 6.1 | 8.1 | 18.1 | 19.1
From April 1, 2018 to March 31, 2019 | 6.1 | 9.6 | 19.1 | 22.6
From April 1, 2019 to December 31, 2019* | 6.1 | 9.6 | 19.1 | 22.6
From January 1, 2020* | 6.1 | 11.1 | 20.1 | 26.6

*Subject to legislative approval

56. The above table clearly highlights the discriminatory structure and impact of the wine basic tax. Before 1 June 2016, Ontario wines enjoyed a 10% tax advantage over non-Ontario wine. After the PAC recommendations were adopted, tax on non-Ontario wine progressively increased. Ontario wines can now be expected to enjoy a 13% tax advantage over non-Ontario wine when purchased at WRS and wine boutiques, provided the government’s legislation is passed. Accordingly, the wine basic tax favours sales of VQA wine and other 100% Ontario wine, while discriminating against sales of ICB wine made by the WRS operator – that is, wine made using Australian and other imported bulk wine. In so doing, the wine basic tax places an uneven tax burden on the bulk wine inputs used to make those finished products, with Ontario bulk wine gaining significant advantage over its Australian and other bulk wine competitors.

B. RESTRICTIONS ON IMPORTED WINE ACCESS TO RETAIL SALES OUTLETS IN GROCERY

1. Ontario - Measures governing the sale of wine in grocery that favour local wine ("Ontario grocery measures")

110 Australia notes that, under the rates formally in force under current section 27 of the ACRPPPA, Ontario wines in fact enjoy a 14% and 15.5% advantage in WRS and wine boutiques respectively. However, in light of the current legislative reform underway in Ontario, Australia’s submission focuses on the 13% tax advantage to Ontario wine as this represents the most conservative illustration of the discriminatory treatment imposed by the wine basic tax.
57. In 2015, following a report on the beer retailing and distribution system in Ontario, the PAC moved to examine wine and spirits retailing and distribution in Ontario. Following on from that review, the PAC published its recommendations to the Ontario government on the future of wine and spirits retailing and distribution in Ontario\textsuperscript{111}.

58. Based on its review, the PAC proposed a new retail model for wine sales in Ontario that allowed wine sales in up to 300 grocery stores in Ontario. The review proposed two substantive changes to the existing retail sales system for wine in Ontario\textsuperscript{112}:

i) **Grocery authorizations**: The establishment of a new retail channel for domestic and imported wine sales in 150 grocery stores in Ontario through the issuing of new beer and wine authorizations; and

ii) **WRS**: Allowing 150 existing off-site WRS outlets to operate inside grocery stores with a shared check-out. These stores would be permitted to sell any domestic Ontario wine.

59. The PAC report highlighted that one of the key considerations in proposing the new retail model for wine was to "start[ing] from the status quo, not from scratch," in that the "off-site WRS network is an important part of the wine industry in Ontario and drives significant demand for Ontario grapes. Consequently, we wanted to preserve the benefits of the current system..."\textsuperscript{113}. The report highlighted that those "benefits" of the off-site WRS system should be preserved as that system was "an important part of the domestic wine industry"\textsuperscript{114}. This indicates that a key objective in designing the new retail model for wine was to maintain and build on the existing competitive advantages that Ontario's already discriminatory WRS system for wine sales provided to the local wine industry.

60. With respect to the new grocery authorizations for the sale of imported and domestic wine in grocery stores, the PAC recommended these be limited to 150 stores, to ensure that the existing off-site WRS network and the LCBO stores were not undermined\textsuperscript{115}. It recommended an initial allocation of 70 licences, split into two groups of 35 licences: one group of 35 would be restricted for the first three years to selling *only Ontario VQA wine* (i.e. 100% Ontario wine), while the other 35 licences could sell domestic and imported wine subject to certain conditions. The rationale for

\textsuperscript{111} PAC Report, Exhibit AUS-17.
\textsuperscript{112} PAC Report, Exhibit AUS-17.
\textsuperscript{113} PAC Report, Exhibit AUS-17, p. 8. (emphasis added)
\textsuperscript{114} PAC Report, Exhibit AUS-17, p. 12.
\textsuperscript{115} PAC Report, Exhibit AUS-17, p. 11.
splitting the licences into two tranches, and limiting one tranche of licences to selling domestic wine only for three years was to "allow time for the industry to adapt to the new Wine in Grocery channel". That is, the purpose of designing this proposed retail model in this way was to provide domestic wines a head start over foreign competitors in this new grocery retail channel.

61. With respect to the changes to the WRS system, the PAC proposed that 150 off-site WRS outlets be permitted to relocate their store outlets to operate inside grocery with a shared checkout to provide "one-stop" shopping for consumers. These grocery stores would also be permitted to broaden their assortment to sell wines of any Ontario producer (rather than just the wine of the manufacturer owning the WRS licence as was previously the case). As was the position under the existing WRS system, the new model maintained the prohibition on imported bottled wine being sold in these outlets.

62. In summary, the PAC proposed consumers would be able to purchase wine at up to 300 grocery stores in the Ontario. However, 150 of these grocery store outlets would be reserved for domestic wine made in Ontario only (through the relocation of the WRS outlets).

63. In June 2016 the Ontario Government legislated to implement the PAC Report recommendations through *Ontario Regulation 232/16, Sale of Liquor in Government Stores* to permit the retail sale of wine in grocery stores in Ontario in up to 300 locations across Ontario as follows:

- by authorising up to 150 grocery stores to sell imported and domestic wine under restricted and unrestricted beer and wine authorizations subject to certain conditions with respect to wine sales and display ("grocery store authorizations"); and
- by authorising up to 150 existing WRS outlets to relocate from outside grocery stores to more desirable space within grocery stores as "wine boutiques" with a shared checkout. These grocery stores can sell only domestic wine made in Ontario ("wine boutiques").

116 PAC Report, Exhibit AUS-17, p. 13.
119 See Section II.B.2 for an explanation of the wine that can be sold in the WRS system.
64. These legislative changes came into force on 23 June 2016, with sales starting on 28 October 2016\textsuperscript{121}, and are described in more detail in the following two sections. A summary of the relevant legislated conditions under which wine can be sold in grocery is demonstrated in Figure 1 below (from an LCBO presentation)\textsuperscript{122}:

![Figure 1]

65. While legislation that was ultimately adopted for the grocery store authorizations does not overtly limit one tranche of licences to Ontario VQA wine, it nevertheless splits the grocery authorization licences into two tranches (restricted and unrestricted authorizations) as per the PAC recommendation, based on arbitrary criteria that, as Australia will demonstrate, favour domestic wine to the detriment of imported wine. It is telling that the PAC review, which was the impetus for these legislative changes, recommended this split tranche design based on the need to provide


\textsuperscript{122} Mandesh Dosanjh, LCBO Supply Chain, 2017 Insights Conference (7 March 2017), Exhibit AUS-47, p. 5.
a competitive transition to the domestic wine industry. As Australia will demonstrate below, the ultimate design and operation of the new measures, does provide a competitive benefit to domestic wine in the grocery sales channel, thereby fulfilling the objective of the PAC Report.

(a) Grocery store authorizations

66. Under Canada – Measures Governing the Sale of Wine (Regulation 232/16), grocery stores are permitted to sell both domestic and imported wine under certain conditions. Regulation 232/16 establishes two classes of authorizations that permit wine sales in grocery stores subject to certain conditions: a "beer and wine authorization" (unrestricted authorization) and a "restricted beer and wine authorization" (restricted authorization). After 3 years restricted authorizations convert to unrestricted authorizations. Initially, 70 authorizations have been issued; 35 unrestricted authorizations and 35 restricted authorizations.

67. Under restricted authorizations, grocery stores are restricted for the first 3 years, to only selling single-origin wine (produced using grapes from a single country) that is:

- produced by a "small winery" - a manufacturer of wine whose worldwide wine sales are less than 200,000 litres per year and every winery that is an affiliate of the manufacturer is also a small winery; or
- "quality assurance wine" that is produced by a "mid-sized winery" - a manufacturer of wine whose worldwide wine sales do not exceed 4.5 million litres, but are more than 200,000 litres per year and every affiliate of the manufacturer is also a mid-sized or small winery.

68. "Quality assurance wine" is defined as wine that is designated as meeting the quality control standards of a statutory appellation of origin regime that certifies, in the aggregate, less than 50 million litres of wine (excluding cider) annually (i.e. wine from small appellation of origin regimes, such as Ontario).
69. The effect of the criteria is that grocery stores holding restricted authorizations are limited to selling only wine produced by small wineries (ostensibly foreign and domestic) or wine from a small appellation of origin regime produced by mid-size wineries.

70. In addition to establishing restrictions on types of wine that can be sold, Regulation 232/16 also requires that at least 20% of the wine containers on display in stores with a restricted authorization must be wine manufactured by "small wineries".

71. Under an unrestricted authorization, grocery stores are permitted to sell any beer and wine, provided that the following conditions are met:

- At least 50% of the wine displayed in the grocery store must be single-origin (wine that is produced using grapes from a single country) and satisfies at least one of the following:
  - the wine is "quality assurance wine"; or
  - the wine is from a "small winery"; or
  - the wine is from a country that produces, in the aggregate, less than 150 million litres of wine annually from grapes grown in that country (i.e. wine from a small wine producing country).

- At least 10% of wine on display must be wine manufactured by "small wineries".

72. The effect of the criteria is that grocery stores holding unrestricted authorizations must dedicate at least 50% of their available shelf space to single origin wine produced by small wineries, or wine from small appellation of origin regimes or wine from a small wine producing country.

73. Under both classes of authorization, where Ontario VQA wine (which is by definition 100% Ontario wine) is sold the regulations also mandate that the grocery store must have at least one sign indicating the availability of VQA wine.

74. The LCBO is the wholesaler of record for all beverage alcohol sold by grocery stores. In addition to meeting the conditions in Regulation 232/16, in order to be sold in a grocery store

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131 Regulation 232/16, Exhibit AUS-41, s. 25(3).
132 Regulation 232/16, Exhibit AUS-41, s. 25(2).
133 Regulation 232/16, Exhibit AUS-41, s. 24(2).
134 LCBO Grocery Operations, Presentation to Ontario Wine Manufacturers & Agents, July 2016, Exhibit AUS-87, p. 27.
in either class of authorization, a wine must first be "listed" by the LCBO. To be listed by the LCBO a wine must meet its listing criteria and gross profit quotas\(^{135}\). The LCBO is responsible for assessing whether a wine meets the requirements in Regulation 232/16, and keeps a (non-public) list of the wines that can be sold\(^{136}\). The LCBO is thus responsible for the application of the conditions in Regulation 232/16 to assess whether a wine is eligible\(^{137}\), which thus forms part of the measures. This includes the LCBO's assessment of the eligibility of a certification regime for the "quality assurance wine" criteria under Regulation 232/16, as discussed in section IV.C.2(c).a below.

75. It appears that the LCBO has arbitrarily deemed certain imported wines as not eligible to qualify for grocery stores – specifically imported wines in the LCBO "Vintages" category, which is the LCBO's fine wine and premium spirits business unit. The LCBO's product template for wine in grocery states that "Import and Out-Of-Province Vintages" do not qualify for grocery, whereas Ontario wines in the Vintages category are not subject to this stipulation\(^{138}\).

(b) Wine boutiques

76. Regulation 232/16 also implemented the change proposed by the PAC report to the WRS system by permitting WRS outlets to relocate inside grocery stores with a shared checkout, to sell any Ontario wine\(^ {139}\). While the WRS system has existed in Ontario for years, Regulation 232/16 made two significant changes to this system: 1) permitting WRS outlets to move into grocery stores through a "wine boutique" within the store and 2) permitting these boutiques sell any Ontario VQA wine (not only wine produced by the WRS licence holder)\(^ {140}\).

77. As described in section II.B.2, the WRS system in Ontario is limited to wines that are made by a wine manufacturer in Ontario, which includes VQA wine and ICB wine. This means that, by definition, imported bottled wine (i.e. wine bottled in another country and imported to Ontario) is prohibited from sale through the WRS system (given that it is not made in Ontario). While

\(^{135}\) Canada's State Trading Notification, Exhibit AUS-5, p. 28.
\(^{136}\) Regulation 232/16, Exhibit AUS-41, ss. 22(2) and 25(4).
\(^{137}\) See also, slide 'Wine Catalogue Committee' from LCBO Grocery Operations, "Wine in Grocery" Presentation, 25 April 2017, Exhibit AUS-49; and LCBO Ontario Product Template – Wine in Grocery, Exhibit AUS-50, p. 6.
\(^{139}\) Wine Coming to Grocery Stores Across Ontario, Exhibit AUS-45.
\(^{140}\) Ontario Selects First Grocers to Sell Wine, Exhibit AUS-46; and Wine Coming to Grocery Stores Across Ontario, Exhibit AUS-45.
Regulation 232/16 expanded access for domestic Ontario wine, in particular VQA wine in wine boutiques, the prohibition for imported bottled wine has been maintained in "wine boutiques" in grocery stores. Imported bottled wines are entirely excluded from these grocery outlets.

78. Regulation 232/16 created a new category of "wine boutiques" for the sale of wine in grocery stores defined as 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". Wineries are authorized to operate a wine boutique in a grocery store if they hold a WRS authorization and they have a "supplementary wine authorization". A "supplementary wine authorization" is a new class of authorization created under Regulation 232/16, defined as "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)". A "supplementary wine authorization" may be issued to a winery, for the operation of a wine boutique, where the winery owns and operates at least three off site winery retail stores. Thus, the new authorizations permit VQA wine from any Ontario manufacturer to be sold in grocery stores through wine boutiques.

79. "VQA wine" in Regulation 232/16 is defined as Vintners Quality Alliance wine as defined in the VQA Act.

80. A wine boutique must be in a space with a separate name, and distinguishable from the rest of the grocery store. A winery operating a wine boutique must enter into a wine boutique agreement with a hosting grocery store that holds an authorization "as a wine boutique sales agent" issued by AGCO. This authorization permits the grocery store operator to sell wines in the wine boutique as agent of the winery. In the wine boutique agreement, the winery agrees to lease

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141 Regulation 232/16, Exhibit AUS-41, ss. 1 and 28.1.
143 Regulation 232/16, Exhibit AUS-41, s. 28.1.
144 Regulation 232/16, Exhibit AUS-41, ss. 28.3(3) and 31.1.
145 Regulation 232/16, Exhibit AUS-4, s. 2; see section II.B.2 above for a description of VQA wine.
146 Regulation 232/16, Exhibit AUS-41, s. 28.5.
147 Regulation 232/16, Exhibit AUS-41, s. 28.1(2).
148 Regulation 232/16, Exhibit AUS-41, s. 28.1-28.3.
space in the store’s shopping area to sell wine, and the grocery store agrees to sell wine as an agent for the winery.\textsuperscript{149}

81. A wine boutique in grocery is subject to mandatory shelf-display requirements for the wine that it has on display for sale in the boutique.\textsuperscript{150} At least 50\% of the wines on display in a wine boutique must be VQA wine (which by definition is Ontario wine produced in Ontario from grapes or grape juice from Ontario with no foreign content), and at least half of those must be wines manufactured by another winery.\textsuperscript{151} At least 5\% of the wines on display must be manufactured by a "small winery."\textsuperscript{152} Wineries that operate wine boutiques are also required to hit mandatory sales targets for VQA wine under the Regulations. Wine boutique operators must ensure that at least 20\% by value of wine sold in each 12-month period is VQA wine and at least 40\% of the VQA wine sold is from other wineries.\textsuperscript{153} Wine boutique operations must also establish a policy describing measures they will take with the goal of ensuring that at least 25\% of the wine sold in any 12-month period is VQA wine, and that at least 50\% of the VQA wine sold is manufactured by other wineries.\textsuperscript{154} The wine boutique must also have at least one sign indicating that VQA wines are for sale.\textsuperscript{155}

82. The wine boutique shelf-space restrictions and sales goals for 100\% Ontario wine further reinforce the discrimination against imported wine by incentivizing Ontario wine producers to use 100\% local raw materials in their wines, encouraging production of 100\% Ontario wines and discouraging production of wines made with imported content.

83. In October 2016, 70 licences were issued for wine boutiques, and as of November 2018, 68 were operational,\textsuperscript{156} although up to 150 stores could ultimately be authorized to operate inside grocery stores as wine boutiques.\textsuperscript{157}

\textsuperscript{149} Regulation 232/16, Exhibit AUS-41, s. 28.6.
\textsuperscript{150} See Wine Boutiques in Grocery Stores Factsheet, Exhibit AUS-51.
\textsuperscript{151} Regulation 232/16, Exhibit AUS-41, s. 28.9(2).
\textsuperscript{152} Regulation 232/16, Exhibit AUS-41, s. 28.9(3).
\textsuperscript{153} Regulation 232/16, Exhibit AUS-41, s. 28.10(2).
\textsuperscript{154} Regulation 232/16, Exhibit AUS-41, s. 28.10(1).
\textsuperscript{155} Regulation 232/16, Exhibit AUS-41, s. 28.9(4).
\textsuperscript{156} LCBO Grocery Operations, Grocery Channel – Program Update & Inventory, 29 November 2018, Exhibit AUS-52, p. 5.
\textsuperscript{157} PAC Report, Exhibit AUS-17.
84. The LCBO itself has recognised the benefit that the new wine boutiques have provided to domestic Ontario wine, noting in its recent annual report that "52 new wine boutiques also opened in authorized grocery stores, contributing to an increase in the volume of Ontario wine sold this year"\(^{158}\).

(c) Wine sales in the new grocery channel

85. The grocery sales channel is likely to drive increased wines sales, as it has competitive advantages that other retail channels for wine sales do not\(^{159}\). The LCBO's Strategic Plan for 2017-2020 noted that: "Grocery stores have a competitive advantage as they are able to provide a one-stop shopping experience for customers who want to buy food and beverage alcohol at the same time"\(^{160}\).

86. While the data on wine sales in the new grocery channel is limited as the grocery measures are relatively new, this channel presents future opportunities for wine in this sales channel as it is expected to see rapid growth and an increasing share of sales. This is recognised in the LCBO Annual Report for 2016-2017, which states that the grocery channel is "expected to see rapid growth in the coming years and an increasing share of LCBO sales"\(^{161}\).

87. Available LCBO data reveals the dominant share that Ontario VQA wine enjoys in the new grocery channel as compared to the share it has in the LCBO retail channel. According to LCBO data (FY17 to FY18 sales), VQA wine accounted for almost half (49%) of grocery store wine sales, whereas VQA wine accounted for a mere 7% of wine sales in the LCBO retail sales channel\(^{162}\). Imported wine accounted for 50% of wine sales in grocery and 76% of wine sales in LCBO retail stores (keeping in mind that in LCBO stores, domestic wines enjoy promotional advantages\(^{163}\)\(^{164}\)). This indicates that the grocery sales measures are artificially skewing sales in favour of domestic wine.

\(^{159}\) See section II.C of this Submission.
\(^{160}\) LCBO Strategic Plan 2017-2020, Exhibit AUS-22, p. 33.
\(^{161}\) LCBO Annual Report 2016-2017, Exhibit AUS-54, p. 30 and see also p. 40 which recognises that the grocery channel will draw customers away from other retail channels.
\(^{163}\) See section II.B.2 of this Submission.
2. Quebec – discriminatory measures governing the sale of wine that provide domestic wines direct access to grocery and convenience stores ("Quebec grocery measures")

88. As set out in section II.B.3, prior to the new measures introduced through Bill 88: An Act respecting development of the small-scale alcoholic beverage industry (Bill 88)\(^{165}\), grocery and convenience stores were only permitted to sell a limited type of wine bottled in Quebec\(^{166}\). These include "table wines" that are private label wines that are owned by operators holding industrial wine makers permits\(^{167}\). These permit holders import wine in bulk and bottle it locally under their own private brands for sale in groceries\(^{168}\). As set out above, this wine is distributed through the SAQ network\(^{169}\). All imported Australian brands of wine that are not bottled in Quebec are excluded.

89. Legislation came into force in Quebec in December 2016, enacted by Bill 88\(^{170}\), to allow the distribution and sale of Quebec wine produced by Quebec small-scale winemakers directly in groceries and convenience stores in Quebec without going through the SAQ\(^{171}\).

90. In a press release on 20 December 2016 issued by the Quebec Ministry for Finance, Minister Leitao said that the new changes would\(^{172}\):

\[
\text{...open[s the door to the sale of Québec small-scale wines in grocery stores, we are meeting the expectations expressed by producers over the past several years, by providing them with a legislative framework tailored to today’s realities...}
\]

\[
\text{… Québec’s wine and alcoholic beverage industry is growing, so it was essential to modernize our legislation in order to support industry producers by opening up new sales outlets that will enable them to increase their visibility and expand as they deserve in all regions... (emphasis added)}
\]

\(^{165}\) Bill 88, An Act respecting development of the small-scale alcoholic beverage industry, 1st Sess, 41st Leg, Quebec, 2016, (Bill 88), Exhibit AUS-56.

\(^{166}\) Grocery Permit Regulation, s. 2, which sets out alcoholic beverages a grocer is permitted to sell, Exhibit AUS-29.

\(^{167}\) Grocery Permit Regulation, Exhibit AUS-29, s. 3.

\(^{168}\) USDA GAIN Report, Exhibit AUS-27.

\(^{169}\) See II.B.3 of this Submission; See also, USDA GAIN Report, Exhibit AUS-27.

\(^{170}\) Bill 88, An Act respecting development of the small-scale alcoholic beverage industry, 1st Sess, 41st Leg, Quebec, 2016, (Bill 88), Exhibit AUS-56.


\(^{172}\) Ibid.
91. Bill 88 amended the SAQ Act to authorize "small-scale production permit" holders to sell and deliver wine they make directly to grocery permit holders. Under that Act, Quebec winemakers with a "small-scale production permit" are authorized to:

- make, blend and bottle wine;
- sell their wine to consumers at the winery; and
- sell and deliver their wine directly to grocery stores (holding a grocery permit) or to the SAQ.

92. For small-scale Quebec winemakers to qualify to sell their wines in grocery and convenience stores under this legislation, their wine must meet the following conditions:

- at least 50% must be the permit holder’s own grapes, fresh or processed;
- no more than 15% of fresh or processed grapes, grape juice or grape must concentrate can come from outside Québec; and
- the remainder may consist of fresh or processed grapes produced by another Québec farm producer.
- From the vintage year 2022, the permit holder must make his wine from fresh or processed grapes that are 100% Québec grown, of which at least 50% comes from the permit holder’s own fresh or processed grapes.

93. The legislation thus allows these Quebec producers to sell their wine directly to grocery and convenience stores, without going through the provincial SAQ distribution system. This is reflected in section 24.1(3) of the SAQ Act which provides that the small-scale production permit holder may "sell and deliver" the "alcoholic beverages [which includes wine] he makes to the holder of a grocery permit", and section 2(7) of the Regulation respecting the terms of sale of alcoholic beverages by holders of a grocery permit which provides that a grocer is permitted to
sell the alcoholic beverages described in the third paragraph of section 24.1 of the SAQ Act "sold and delivered to him" by a small-scale production permit holder.

94. It appears that as a result of being able to sell directly to grocery stores without going through the SAQ, these wines are not subject to the SAQ mark-up. A news article reporting on the new changes, quotes Minister Leitao as stating that "the point of Bill 88 was to give local producers access to the grocery store and supermarkets network and that's now in place, so local wine producers can now sell without surcharge to the local markets". This reference to a surcharge appears to confirm that these wines are not subject to the SAQ mark-up.

95. Imported bottled wine is entirely excluded from sales in convenience and grocery stores in Quebec. These imported bottled wines are limited to retail sales via the provincial SAQ network, and must be distributed through the SAQ. The SAQ network has a maximum of 840 retail sales outlets. In contrast, under the new legislation Quebec winemakers can market and sell their own branded bottled domestic wines directly to grocery and convenience stores, as well as access the SAQ retail sales outlets. This gives these Quebec wines access to an entirely new, additional retail channel with significantly more retail sales outlets than imported bottled wines have access to – there are over 9,000 grocery and convenience stores in Quebec.

C. DISCRIMINATORY LIQUOR BOARD PRODUCT MARK-UPS

1. Nova Scotia – reduced product mark-up for local producers ("product mark-up")

96. The NSLC is the sole importer of beverage alcohol into Nova Scotia, and controls the possession, sale, transportation and delivery of liquor, under the Liquor Control Act (NS LCA).
97. The NS LCA and the *Nova Scotia Liquor Corporation Regulations* (NSLC Regulations)\(^{188}\) give the NSLC authority to set retail liquor pricing in Nova Scotia\(^{189}\). The NSLC Regulations expressly provide that the prescribed prices set by the NSLC include "a retail mark-up sales allocation or similar charge as determined by the NSLC"\(^{190}\). At NSLC outlets, the difference between the retail price and the amount paid to producers for their product represents the mark-up revenue for the NSLC\(^{191}\). The Regulations also expressly provide for the NSLC's policy-making ability as required for administration and operations carried out under the NS LCA and NSLC Regulations\(^{192}\). NSLC's official price list is applicable to all liquor stores - NSLC-operated, agency stores and private wine and specialty stores - throughout Nova Scotia\(^{193}\).

98. The NSLC has a legislative mandate to support the domestic industry under the NS LCA which provides that one of the objectives of the NSLC is the "the promotion of industrial or economic objectives regarding the beverage alcohol industry in the Province"\(^{194}\). The NSLC actively pursues activities and policies to support the local wine industry. This is illustrated across various NSLC publications, including annual reports, business plans and the most recent five-year strategic plan. For example, the 2017-2018 Annual Business Plan highlights NSLC's focus on local industry under the heading "Actions for 2017/18", "We will:...[c]ontinue to collaborate with local industry to support their growth, including the provision of financial incentives which allow them to invest more in their businesses; and by directly utilizing our retail network and retail expertise to promote their available products"\(^{195}\). The current NSLC Five-Year Strategic Plan also highlights the long-term objective of supporting local industry\(^{196}\).

99. This support for the local wine industry is apparent in the NSLC's adoption and application of product mark-ups, which are the subject of this dispute.


\(^{189}\) NS LCA, Exhibit AUS-14, s. 42(1); and NSLC Regulations, Exhibit AUS-59, s. 13(7).

\(^{190}\) NS LCA, Exhibit AUS-14, s. 42(1); and NSLC Regulations, Exhibit AUS-59, s. 13(8).


\(^{192}\) NSLC Regulations, Exhibit AUS-59, s. 39. NSLC’s policy-making ability is set out in section 39 of the Regulations which permits it to "prescribe policy guidelines setting out details and procedures required for administration and operations carried out under the Act and these regulations".

\(^{193}\) NSLC Regulations, Exhibit AUS-59, ss. 13(7) and (8).

\(^{194}\) NS LCA, Exhibit AUS-14, s. 4.

\(^{195}\) NSLC Annual Business Plan 2017-18, Exhibit AUS-61, p. 4.

100. The NSLC applies a general 140% retail mark-up on wine, with lesser retail mark-ups in the following two scenarios: a 120% mark-up on wine bottled in Nova Scotia; and a 43% mark-up to the retail price on wines from an "emerging wine region", this latter of which is set out in a NSLC policy document, the Emerging Wine Regions Policy (the Policy). An emerging wine region is defined in the Policy as:

- the region 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
- total annual production of wine within the political boundaries (state, province, or equivalent) of the region does not exceed 50,000HL annually.

101. The Policy on its face ostensibly applies a reduced mark-up based on whether wine is from an "emerging wine region" as defined in the Policy. However, there is extensive evidence (detailed in the succeeding paragraphs) to show that the Policy was designed based on product origin to afford a reduced product mark-up to domestic Nova Scotia wines to make local producers more competitive in the market, and that the Policy is also in fact applied by the NSLC to afford Nova Scotia wines a reduced mark-up.

102. The introduction of the Policy followed an economic impact study of the wine industry commissioned by the NSLC in 2006. The study recommended that a reduced product mark-up for Nova Scotia wine would accelerate the growth of Nova Scotia as a viable and successful wine region. This is referenced in the 2007-2008 NSLC Annual Report:

   In 2006, the NSLC commissioned an economic impact study of the industry, which revealed the true potential of Nova Scotia as a viable and successful wine region. In this study, it clearly indicated that it was imperative for the NSLC to provide a better mark-up for Nova Scotia wines (made from a minimum 85% Nova Scotia grown grapes, with the balance grown in Canada). Over the past five years sales at wineries' doors have remained relatively stagnant, but growth has been achieved through sales to the NSLC. The study goes on to show that without the assistance of the NSLC, via a change in the mark-up policy, the industry will continue to grow at a modest 4.33%
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per year, with an expectation of 10 wineries producing 1.4 million litres as of 2020.* In this past fiscal year, the NSLC implemented the report's recommendation of a mark-up reduction of 70%. It is anticipated with this change in the mark-up policy will accelerate the growth of the Nova Scotia industry and will lead to a 20 wineries in operation, with more than 1,000 acres of grapes under growth, producing close to 2.5 million litres of wine by 2020*. (emphasis added)

103. The 2009/2010 NSLC Annual Report also confirms that the Policy was adopted following on from the above referenced study, to boost the competitiveness of local wines and local producers. Under the heading "Supporting local businesses", the Report describes the reasons for the adoption of the Policy as follows:

The NSLC is committed to ensuring the Nova Scotia wine industry grows and becomes an even more important part of the local economy. Working with the Wine Association of Nova Scotia (WANS), in 2006 the NSLC commissioned an in-depth study of the industry. Based on the study's findings, the NSLC adopted the “Emerging Wine Regions Policy,” which provided a 70 per cent mark-up reduction for wines from emerging regions including Nova Scotia wines and for wine containing a high content of locally grown grapes. Wineries can now sell their products in NSLC stores with higher profit margins, allowing them to re-invest in their businesses, be more competitive and help educate customers through various merchandising initiatives.201. (emphasis added)

104. The 2011-12 NSLC Annual Report again confirms that the Policy was adopted to support the domestic industry, and that Nova Scotia wines are granted the reduced mark-up through the Policy. It notes that "the NSLC introduced the emerging wine industry pricing policy to help accelerate the growth of this rapidly developing industry in our province".202. The Wine Association of Nova Scotia (WANS) is also quoted in that annual report as saying of the NSLC "My NSLC has supported the local wine industry for more than 25 years helping it to gain momentum. Nova Scotia wineries are now able to sell their products in NSLC stores with higher profit margins, allowing them to re-invest in their businesses, be more competitive and help

201 NSLC Annual Report 2009-2010, Exhibit AUS-67, p. 13. See also p. 48, which states that the NSLC introduced an emerging wine region policy to "encourage the industry's development."
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educate customers through various merchandising initiatives. *Nova Scotia wines are now the fastest growing category of wines – it’s so exciting to see the hard work be so successful*[^203].

105. The Policy is in fact applied by the NSLC to grant Nova Scotia wines a significantly reduced product-mark up to the retail price (43%) as compared to other wines, which are subject to a 140% mark-up. This is evident from the NSLC mark-up schedule where "NS wine" (i.e. Nova Scotia) is listed as having a mark-up of 43%, while wine of non-Canadian origin is listed as having a mark-up of 140%[^204]. This is further evidenced through statements of the NSLC and media reports referenced below.

106. Numerous NSLC publications, statements of NSLC representatives, statements of representatives of the Nova Scotia Winery Association and media reports following on from the introduction of the Policy confirm the fact that the NSLC applies this 43% "preferential mark-up" to local wine:

- The 2017-2018 NSLC Annual Business Plan references the assistance to local industry by the provision of preferential mark-ups:

  Supporting local industry is an important part of our mandate and one of our three key focus areas as identified in our Five-Year Strategic Plan. Nova Scotians’ continue to support the “Buy Local” movement, and so do we. The local beverage alcohol industry in Nova Scotia is growing. *We work hard to do our part to contribute to the success of the industry by providing preferential markups*, giving direct monetary support for industry associations, listing and promoting the products our local producers bring to market, and by providing advice and support to help local products succeed[^205]. (emphasis added)

- The 2015-2016 NSLC Annual Report states that "[s]upporting local industry is an important part of our mandate. *We provide preferential markups*, direct support for industry associations, we list and promote the products our local producers bring to market, and we provide advice and support to help local products succeed"[^206].

[^203]: Ibid. (emphasis added)
[^204]: NSLC Markup Structure Spreadsheet, April 2017, Exhibit AUS-63.
[^206]: NSLC Annual Report 2015-2016, Exhibit AUS-69, p. 10. (emphasis added)
The 2014-2015 NSLC Annual Report describes under a section "Industry support" that the NSLC "[provides] local products with a reduced markup so that they can better compete on price…"²⁰⁷.

Another example confirming that the NSLC applies the reduced mark-up to Nova Scotia wines is an article on the Nova Scotia wine region from 2010, which states that "[l]ast year the NSLC significantly lowered its mark-up for local wines in order to help the wine industry…This has really helped to boost awareness and sales of Nova Scotia wines in the local wine market"²⁰⁸.

Another media report from 2016 confirms that "[l]ocal wine sales were up 14.7 per cent in the last quarter of 2015, compared to the same three-month period in 2014…The steady growth in sales has followed the introduction of the emerging wine regions policy in 2007. The policy mandates favourable markups for all local products sold through the NSLC"²⁰⁹.

In a Nova Scotia House of Assembly Committee on Public Accounts meeting on 26 November 2014, Mr Bret Mitchell, then President and CEO of the NSLC, confirmed that a reduced mark-up was applied by the NSLC to local wines as compared to imported wines and that this had helped to increase the sale of local wine, in the following exchange:

MR. HOUSTON: I'm thinking of the wine industry here. I know that wine sales are going up and you also mentioned craft beer sales are going up. Do I understand correctly that the NSLC cut its markup that it had on local wine a few years ago and did that help to increase the sales of the wine?

MR. MITCHELL: Absolutely. The first answer is yes, we did cut our markup, and it has absolutely allowed them to sell within our environments. The Nova Scotia wineries are very small with the exception of a couple. Their ability to compete nationally even is very restricted at this point in time.

²⁰⁹ Avi Jacob, 'As Nova Scotia wine industry grows, so does shelf space in stores,' The Signal (online), 26 March 2016 <https://signalhfx.ca/more-local-choice-for-wine-means-more-competition>, (As Nova Scotia wine industry grows, so does shelf space in stores), Exhibit AUS-72, p. 2. (emphasis added)
As open, transparent and as helpful as we are to them, the rest of the world is not so much. So we have been providing them with tremendous support - proud to do so and glad to do so - that would allow them to sell products within our environment that they can make money on. *So their markup structures are significantly reduced.* We virtually make 25 to 30 per cent gross margin on a bottle of Nova Scotia wine, on an international wine we'd be making a 60 per cent margin.

It's a significant reduction, it allows them to again market within our stores. We virtually give them carte blanche, they can come in and we'll take everything they have, assuming that it's drinkable. But if it's drinkable, we'll take everything they have; every listing they offer us, we will take it.

MR. HOUSTON: *So that has really grown the industry then.*

MR. MITCHELL: *Yes* 210.

- In a Nova Scotia House of Assembly Resources Committee meeting on 21 May 2015, on the topic of the Nova Scotia Wine Industry, Mr Gerry McConnell, then Interim Chair and President of the Winery Association of Nova Scotia (WANS), said of the mark-up:

  …one of the greatest things that WANS achieved as an organization was *what we called the preferred markup*, which is when you take your wines to the NSLC…they mark it up 43 per cent and then it's sold, so that your price jacks up, but *the margin for the Liquor Corporation is 43 per cent.*

When they bring in wine from Australia, China or wherever, the markup there is 100 per cent, 120 per cent, and I understand up to 200 per cent… 211.

107. The foregoing evidence overwhelmingly demonstrates that, despite the Policy appearing to provide any wines from a region meeting the Policy's criteria with a reduced mark-up, the Policy is not in reality about emerging wine regions. The Policy is instead designed and in fact applied to

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afford protection to local wines by granting Nova Scotian wines a reduced (preferential) mark-up of 43%.

108. This is further supported by evidence of the Nova Scotian wine industry's understanding of the Policy as simply a means of providing preferential mark-up treatment to domestic wines. In a Nova Scotia House of Assembly Standing Committee on Resources, Mr McConnell (the then Interim Chair and President of WANS) described the Policy as follows:

…NSLC’s Emerging Wine Regions Policy, which is a fancy description of a preferred markup. An emerging regions policy is used so hopefully we can continue to duck any trade attack because we’re giving preferential treatment to an industry in the province…

109. Moreover, the NSLC’s mark-up spreadsheet confirms that the reduced mark-up of 43% is in fact applied to Nova Scotian wines. This spreadsheet does not even refer to wine from an emerging wine region, but simply classifies wine as being from Canada, not from Canada, or from "NS" i.e. Nova Scotia, with only that latter category having a 43% mark-up listed against it.

110. A steady growth in sales of Nova Scotian wine has followed the introduction of the reduced mark-up for domestic wine through the Policy, with Nova Scotian wines increasing their market share over foreign competitors. A 2015 media report notes that "[l]ocal wine sales were up 14.7 per cent in the last quarter of 2015, compared to the same three-month period in 2014….The steady growth in sales has followed the introduction of the emerging wine regions policy in 2007. The policy mandates favourable markups for all local products sold through the NSLC"214. The NSLC 2013-2014 Annual Report, notes that there has been a 137% increase in Nova Scotia wine sales since 2008215. The 2012-2013 NSLC Annual report highlights that Nova Scotia wine sales doubled since 2008, and notes that "if Nova Scotia was a wine country of its own, it would rank 5th in overall sales, outselling established wine-producing countries like Chile, Argentina and even France"216. The 2014-2015 NSLC Annual Report also highlights that sales of Nova Scotia wines had nearly doubled in the last five years and now "surpass[ed] those from France, Chile and

212 Committee on Resources - Winery Association of Nova Scotia, Exhibit AUS-74, p. 10. (emphasis added)
213 NSLC Markup Structure Spreadsheet, Exhibit AUS-63.
214 As Nova Scotia wine industry grows, so does shelf space in stores, Exhibit AUS-72. (emphasis added)
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Australia217. The 2015-2016 NSLC Annual Report states that one in ten bottles of wine sold in NSLC stores is Nova Scotian218.

IV. LEGAL ANALYSIS

A. OVERVIEW OF ARTICLE III OF THE GATT 1994

1. General principle in Article III:1

111. Article III of the GATT 1994 sets out a seminal principle of trade law, being the principle of "national treatment". It imposes a general prohibition on the use of internal taxes and other internal regulatory measures to afford protection to domestic production. It is fundamentally aimed at avoiding "protectionism in the application of internal tax and regulatory measures"219. This general principle is articulated in Article III:1 and informs the rest of Article III220. Article III:1 states:

   The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations should not be applied to imported or domestic products so as to afford protection to domestic production.

112. The Appellate Body has repeatedly confirmed that Article III is concerned with securing equality of competitive conditions and opportunities and not regulating the actual trade effects of a particular measure221. In Japan – Alcoholic Beverages II, the Appellate Body noted:

   The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. … Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products…

219 Appellate Body Report, Japan – Alcoholic Beverages II, p. 16.
221 Appellate Body Reports, Japan – Alcoholic Beverages II, p. 16; Canada – Periodicals, p. 18; Korea – Alcoholic Beverages, para. 120; and EC – Seal Products, para. 5.82.
Moreover, it 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.

113. In Korea – Alcoholic Beverages, the Appellate Body summarised the objectives of Article III as "avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships". These objectives have been consistently applied by subsequent WTO panels and were recently re-affirmed by the Appellate Body in EC – Seal Products and Philippines – Distilled Spirits.

2. Relationship between Article III:2 and III:4 where the same measure is alleged to violate both provisions

114. The general principle under Article III:1 that internal measures should not be applied so as to afford protection to domestic production finds "specific expression" in Articles III:2 and III:4 of the GATT 1994. As the panel in Brazil – Taxation measures recently noted:

[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.]

115. While this textual separation within Article III generally indicates that fiscal measures should be examined under Article III:2 and non-fiscal regulations under Article III:4, in practice, the measures which fall within the scope of each paragraph overlap. Measures consisting solely of administrative requirements can be subject to the disciplines of Article III:2 to the extent that they

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222 Appellate Body Report, Japan – Alcoholic Beverages II, pp. 16.
223 Appellate Body Report, Korea – Alcoholic Beverages, para. 120.
224 See, e.g. Panel Reports, US – Cotton Yarn, para. 7.56; Chile – Alcoholic Beverages, paras. 7.22-23; and Mexico – Taxes on Soft Drinks, para. 8.44.
225 Appellate Body Report, EC – Seal Products, para. 5.82.
228 Panel Report, Brazil – Taxation Measures, para. 7.33.
have tax implications for domestic and imported products. Similarly, taxes can amount to internal regulations, for example, where they affect the internal use of a particular product. Measures that possess both tax and administrative aspects can be inconsistent with both Articles III:2 and III:4 if those "features...operate simultaneously". As a result, it is common practice to challenge the same measure under both Articles III:2 and III:4.

116. Australia challenges two measures – the federal excise exemption and the Nova Scotia mark-up – under both Article III:2 and alternatively Article III:4 of the GATT. The challenge under Article III:4 is cast as an alternative. This is because, recognising the narrower scope of Article III:2, Australia considers it appropriate for the Panel to commence its analysis with the claims under Article III:2 before analysing the claims under Article III:4. As the Appellate Body observed in US – Wool Shirts and Blouses, "a panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute." In previous cases, if Article III:2 inconsistency was established, WTO panels exercised judicial economy on Article III:4 claims. Consistent with these practices, Australia considers that the Panel may exercise judicial economy in relation to the claims under Article III:4 if its findings under Article III:2 are capable of grounding "sufficiently precise recommendations and rulings" to secure an effective resolution to the issue in dispute.

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231 Panel Report, Brazil – Taxation Measures, para. 7.34.
232 For example, GATT Panel Report, US – Malt Beverages (e.g. state licensing fees, para. 5.53); Panel Reports, Canada – Periodicals; Mexico – Taxes on Soft Drinks.
233 Appellate Body Reports, Japan – Alcoholic Beverages II, p. 20; EC – Asbestos, para. 95.
235 For example, Panel Reports, US —  Wool Shirts and Blouses, p. 18, DSR 1997:I, p. 323; at 339; and Canada – Periodicals, para. 5.30. However, it should be noted that the same measure in China – Auto Parts was found inconsistent with both paragraphs of Article III (see Appellate Body Report, China – Auto Parts, paras. 183 and 197). Panels have also proceeded to examine claims under Article III:4 despite findings of Article III:2 inconsistency where there was uncertainty about the characterisation of the measure at issue or the measure contained both tax and administrative features. For example, Panel Report, Mexico – Taxes on Soft Drinks, paras. 8.101-102 where the panel examined alternative claims under Article III:4 despite finding the soft drink tax and distribution tax inconsistent with Article III:2, first sentence "in the event that either or both of the two measures should be considered more properly as measures affecting the internal use of sweeteners, rather than as internal taxes on sweeteners". In Thailand – Cigarettes (Philippines), paras. 7.737-738, and Brazil – Taxation Measures, paras 7.31-38, broadly, fiscal aspects of the measures at issue were addressed under Article III:2 while the administrative aspects were addressed under Article III:4.
236 Appellate Body Report, Australia – Salmon, para. 223.
237 Appellate Body Reports, Australia — Salmon, para. 223; and Japan — Agricultural Products II, para. 111.
3. Article III requires treatment no less favourable than the "most favoured" domestic product within the territory of a Member

117. The majority of the Canadian measures that Australia is challenging are provincial government measures. In most cases those measures not only draw a distinction in treatment between the relevant province's domestic products and imported products, but also against products from other Canadian provinces. Previous WTO and GATT panels have considered the application of Article III in this situation. Those panels have confirmed that the national treatment provisions in Article III require a Member to accord to imported products treatment no less favourable than that accorded to the "most-favoured domestic products" within the territory of that Member. As the panel in *Canada – Wheat Exports and Grain Imports* explained:

…it is clear from GATT/WTO jurisprudence that where an origin-based difference in regulatory treatment is made between products originating in one area, region or administrative unit of a country and all other like products - that is, like products originating in other areas of the same country or originating in foreign countries - Article III:4 requires that the foreign product be granted treatment no less favourable than that accorded to the most-favoured domestic product.

118. Similarly, the GATT Panel Reports *Canada – Provincial Liquor Boards (US)* and *US – Malt Beverages* considered measures of provincial liquor boards which applied both to alcoholic beverages from outside Canada and the US respectively and to alcoholic beverages from other provinces within Canada and the US respectively. In considering whether differential excise taxes levied by US states breached Article III of the GATT 1947, the *US – Malt Beverages* Panel noted that it:

…did not consider relevant the fact that many of the state provisions at issue in this dispute provide the same treatment to products of other states of the United States as that provided to foreign products. 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

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imported products no less favourable than that accorded to the most-favoured domestic products\textsuperscript{240}. (emphasis added)

119. Accordingly, the fact that many of the provincial measures at issue draw regulatory distinctions between products of that province and products of other Canadian provinces as well as imported products does not preclude a finding of a breach of Article III:4 or III:2. The comparison of treatment for the purposes of these articles will be between the treatment accorded to imported products and the treatment accorded to the "most-favoured" domestic products within the relevant provinces.


1. Article III:2 – overview of legal standard

120. Article III:2, first sentence, of the GATT 1994 is a specific application of the general "national treatment" obligation\textsuperscript{241} and prohibits the discriminatory application of internal taxes and other internal charges to like products. It provides:

\begin{quote}
The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or any other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.
\end{quote}

121. The legal requirements for demonstrating a breach of Article III:2 are well-established in WTO jurisprudence\textsuperscript{242} and consist of three elements: (i) the threshold question of whether the measure at issue is an internal tax or other internal charge\textsuperscript{243} applied "directly or indirectly" to products; (ii) imported and domestic products are "like" products\textsuperscript{244}; and (iii) whether imported products are taxed in excess of like domestic products\textsuperscript{245}. Although Article III:2 first sentence is

\textsuperscript{240} GATT Panel Report, \textit{US - Malt Beverages}, para. 5.17; see also para.5.33.
\textsuperscript{241} Appellate Body Report, \textit{Japan – Alcoholic Beverages II}, p. 18.
\textsuperscript{242} For example, Appellate Body Reports, \textit{Japan – Alcoholic Beverages II}, pp. 18-19 and \textit{Canada – Periodicals}, p. 20; Panel Reports, \textit{Argentina – Hides and Leather}, para. 11.131; and \textit{Brazil – Taxation}, paras. 7.98-7.100.
\textsuperscript{244} Appellate Body Reports, \textit{Canada – Periodicals}, p. 20 and \textit{Japan – Alcoholic Beverages II}, p. 18.
\textsuperscript{245} Appellate Body Reports, \textit{Canada – Periodicals}, p. 20 and \textit{Japan – Alcoholic Beverages II}, p. 19.
regarded as a specific application of the general principle in Article III:1 that "internal measures should not be applied so as to afford protection to domestic production"\(^{246}\), the Appellate Body has determined it is not necessary to separately establish the "presence of a protective application" to demonstrate a breach\(^{247}\). The only requirements the complainant must satisfy "are those contained in Article III:2, first sentence, itself"\(^{248}\). If the complainant can establish a breach of Article III:2, the measure will be deemed to "afford protection to domestic production" within the meaning of Article III:1\(^{249}\).

\((a)\) The measure at issue is an internal tax or other internal charge applied directly or indirectly to a product

122. Whether a measure is an "internal tax or other internal charge" within the meaning of Article III:2, first sentence is a threshold question that must be determined in "light of the characteristics of the measure and the circumstances of the case"\(^{250}\). Both taxes and charges are subject to the disciplines of Article III:2. Sales taxes and excise duties are uncontroversial examples of "internal taxes" which have been found to fall within the scope of Article III:2, first sentence of the GATT 1994\(^{251}\) while "charges of any kind" is a broad term which includes a "pecuniary burden" and a "liability to pay money laid on a person"\(^{252}\).

123. One of the critical characteristics of a qualifying measure under Article III:2, first sentence is that "the obligation to pay a charge must accrue due to an internal event, such as the distribution, sale, use or transportation of an imported product"\(^{253}\). In many cases, the Appellate Body has acknowledged that this determination will be a "straightforward exercise"\(^{254}\). An "internal event" or "internal factor" is defined broadly as one that takes place within a Member’s territory after importation, for example, where a product has been re-sold or used internally\(^{255}\).

\(^{246}\) Appellate Body Report, Japan – Alcoholic Beverages II, p. 18.
\(^{247}\) Appellate Body Report, Japan – Alcoholic Beverages II, p. 18. This was confirmed in Panel Report, Argentina – Hides and Leather, para 11.137.
\(^{248}\) Panel Report, Argentina – Hides and Leather, para 11.137.
\(^{250}\) Appellate Body Report, China – Auto Parts, para. 171.
\(^{251}\) GATT Panel Reports, Canada – Provincial Liquor Boards (US), para. 5.24 and US – Malt Beverages, para. 5.4.
\(^{252}\) Panel Report, Argentina – Hides and Leather, paras. 11.143-11.144.
\(^{253}\) Appellate Body Report, China – Auto Parts, para. 162. (emphasis added)
\(^{254}\) Appellate Body Report, China – Auto Parts, para 171.
\(^{255}\) Appellate Body Report, China – Auto Parts, para 163.
124. A second critical requirement for a measure to fall within the scope of Article III:2 first sentence is that there must be "some connection, even if indirect, between the respective internal taxes or other internal charges…and the taxed product". Although some past panels have assessed this requirement in the context of determining whether imported products have been taxed "in excess" of like domestic products, the connection between the product at issue and tax is more properly characterised as an issue of scope. In other words, whether a measure applies, directly or indirectly, to a particular product is more relevant to the threshold question of whether Article III:2, first sentence applies to a particular claim than whether the size of a tax differential amounts to "excess" taxation.

125. Indirect taxes have broad scope and explicitly include taxes on "raw materials used in the product during the various stages of its production", intermediate products and other inputs to production. As the panel in Mexico – Soft Drinks observed, "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". The Appellate Body has also recognised that Article III:2, first sentence disciplines both internal taxes that directly affect products and internal taxes that indirectly affect products.

(b) Imported and domestic products are "like" products

126. The Appellate Body has consistently confirmed that "likeness" within the meaning of Article III:2, first sentence is "fundamentally, a determination about the nature and extent of a competitive relationship between and among imported and domestic products". Traditionally,
"likeness" has been assessed according to four relevant criteria: (i) the products' properties, nature and quality i.e. physical characteristics; (ii) the products' end uses; (iii) consumer tastes and habits; and (iv) the products' tariff classification.266

127. The Appellate Body has emphasised that these criteria are "tools available to panels for organizing and assessing the evidence relating to the competitive relationship between and among the products in order to establish 'likeness' under Article III:2, first sentence". The criteria are neither mutually exclusive, necessarily exhaustive nor individually determinative of "likeness". In every case, panels have a duty to examine the evidence as a whole, on a case-by-case basis, to ascertain the nature of the competitive relationship between the products. Panels must also bear in mind that "likeness" is an elastic concept which varies in meaning across the covered agreements, and that under Article III:2, first sentence, "like products" should be narrowly construed.

128. An assessment of likeness based on the traditional criteria is, however, not necessary in every case. Where the measure at issue discriminates between products exclusively on the basis of origin, previous panels have consistently held that "likeness" can be presumed without the need for a full likeness analysis. For example, in Indonesia – Autos, the panel concluded that tax distinctions based on the nationality of the producer or origin of component auto parts "suffices in itself to violate Article III:2 without the need to demonstrate the existence of actually traded like products". Under this approach, a complainant can establish likeness simply by "demonstrating that the measure at issue makes a distinction based exclusively on the origin of the product".278

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266 Appellate Body Reports, EC – Asbestos, para. 101; Japan – Alcoholic Beverages II, p. 20; Canada – Periodicals, pp. 21-22; and Philippines – Distilled Spirits, paras. 118-119; and Panel Report – Brazil Taxation, para. 7.122.
267 Appellate Body Report, Philippines – Distilled Spirits, para. 131. (emphasis added)
268 Appellate Body Reports, Philippines – Distilled Spirits, para. 131 and EC – Asbestos, para. 111.
272 Appellate Body Reports, Japan – Alcoholic Beverages II, p. 20 and Canada-Peiodicals, p. 21.
275 See e.g. Panel Report, Brazil – Taxation, para. 7.124-7.125.
276 Panel Reports, Indonesia – Autos, para. 14.113; Columbia – Ports of Entry, para. 7.182; Argentina – Hides and Leather, paras. 11.168–11.170; and China – Autos, para. 7.216.
278 Panel Report, Brazil – Taxation, para. 7.125.
Imported products are taxed in excess of like domestic products

129. The final element of the test in Article III:2, first sentence enquires whether imported products are taxed in excess of like domestic products.

130. Past panels and the Appellate Body have applied a strict standard of compliance noting that Article III:2, first sentence is not qualified by a de minimus standard, and consequently "[e]ven the smallest amount of 'excess' taxation will be considered "too much". In practice, this means imported products must be afforded "at least identical or better tax treatment" than the most-favoured like domestic product. The relevant comparator is the "actual tax burdens imposed on the taxed products" rather than the nominal rate of taxation since Article III:2 is focused on "the economic impact on the competitive opportunities of imported and like domestic products". Trade effects of the measure at issue will not be relevant to this analysis.

2. The federal excise exemption is inconsistent with Article III:2, first sentence

131. Canada has breached Article III:2, first sentence of the GATT 1994, by imposing discriminatory excise duties on Australian bulk wine. Together subsections 135(1) and 135(2)(a) of the FEA impose duties on packaged wine containing Australian bulk wine inputs while exempting, in full, wines of 100% Canadian origin. This is a clear case of excess taxation on like products which violates the requirements of Article III:2, first sentence and "affords protection to domestic production" in contravention of the principles in Article III:1. As set out in the preceding section, three elements must be satisfied to establish a violation of Article III:2. The following subsections outline how the federal excise exemption satisfies this test.

(a) The federal excise is an "internal tax" within the meaning of Article III:2, first sentence

279 Panel Report, Mexico – Taxes on Soft Drinks, para. 8.52.
i. The obligation to pay excise accrues on packaging which is an "internal event"

132. As set out in section IV.B.1(a), there are two threshold issues that must be satisfied for a claim to fall within the scope of Article III:2, first sentence. First, for the measure at issue to qualify as an "internal tax or other internal charge", the obligation to pay tax must accrue due to an "internal event". Secondly, a connection, which can be indirect, must be established between the tax and product at issue.

133. In relation to the first requirement, an "internal event" has been defined as one that takes place after a product has been imported into a Member’s territory. As the panel noted in China – Auto Parts:

an important element that would indicate that a charge constitutes an "internal tax or other internal charge" within the meaning of Article III:2 of the GATT 1994 is whether the obligation to pay such charge accrues because of an internal factor (e.g., because the product was re-sold internally or because the product was used internally), in the sense that such "internal factor" occurs after the importation of the product of one Member into the territory of another Member. (emphasis added)

134. Section 135 of the FEA clearly satisfies this requirement. Subsection 135(1) of the FEA imposes excise duty only on wine "that is packaged in Canada" with the obligation to pay arising at the time of packaging under subsection 135(3). Accordingly, under the express terms of the provision, "packaging" is an "internal event" since it occurs, by definition, after bulk wine is imported, within Canadian territory. This is consistent with previous WTO cases in which production steps or product uses within the territory were found to constitute "internal events". For example, in China – Auto Parts, the panel placed special emphasis on "the fact that the charge under the measures relates to the internal assembly of auto parts into motor vehicles" in concluding that the measure was an internal charge within the meaning of Article III:2 of the GATT 1994.
135. Previous GATT panels have classified similar measures as internal taxes or charges within the scope of Article III:2. For example, in *US – Malt Beverages*, the parties agreed that differential excise duties almost identical in structure to the present measure were "internal taxes" within the meaning of Article III:2 first sentence. Accordingly, section 135 of the FEA is an "internal tax" within the meaning of Article III:2 first sentence of the GATT 1994.

ii. **Imported Australian bulk wine is indirectly subject to tax under section 135(1) of the Federal Excise Act**

136. In relation to the second requirement, Australia submits that bulk wine is indirectly subject to tax under section 135 of the FEA. As noted above, section 135 is a tax measure which imposes excise on any packaged wine with foreign content (including ICB) at the point of packaging while exempting packaged wine composed of 100% Canadian ingredients in full. It does not apply directly to bulk wine. However, as noted in *Mexico – Taxes on Soft Drinks*, "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".

137. Australian bulk wine is indirectly subject to tax for precisely this reason. As explained above, the effective trigger for tax under section 135 is the presence of non-Canadian ingredients, which necessarily means that any input to the final product composed of such ingredients will trigger liability. Since all Australian bulk wine is, by definition, non-Canadian in origin, and there are no other inputs apart from bulk wine in packaged products, its presence solely triggers tax liability on the finished product. Consequently, Australian bulk wine is indirectly subject to tax under section 135 of the FEA.

138. In contrast, since packaged 100% Canadian wine is, by definition, exempt from duty under subsection 135(2)(a) of the FEA, Canadian bulk wine benefits from an indirect exemption to the extent it is not blended with non-Canadian wine in the final packaged product; that is, remains

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292 GATT Panel Report, *US – Malt Beverages*, paras 5.4-5.5.
293 FEA, Exhibit AUS-34, ss. 135(1), 135(2)(a) and 135(3).
294 FEA, Exhibit AUS-34, s. 135(2)(a).
296 FEA, Exhibit AUS-34, s. 135(2)(a).
100% Canadian. It is irrelevant that Canadian bulk wine used in ICB and privately bottled wine may be taxed comparably to Australian wine under these arrangements. Australia recalls that in US – Malt Beverages, the panel determined that the relevant product comparator for the purposes of assessing compliance with the national treatment obligation is the "most-favoured" domestic product298 – in this case, 100% Canadian wine.

139. The connection between the excise in section 135 of the FEA and Australian bulk wine as the product at issue is analogous to the indirect tax examined in Mexico – Taxes on Soft Drinks. In that case, the panel attached significance to two key factors in finding that non-cane sugar sweeteners were indirectly subject to discriminatory taxation: (i) the fact that the presence of non-cane sweeteners triggered the imposition of the tax at issue; and (ii) the tax burden could be expected to fall at least partially on products containing that sweetener, and consequently on that sweetener299.

140. In this case, the trigger is not an ingredient per se, but the origin of ingredients, and so the tax burden falls not on some, but all, wine containing ingredients of non-Canadian origin.300 Thus, applying the reasoning in Mexico – Taxes on Soft Drinks, Australian bulk wine is indirectly subject to tax because it is the fact of its presence in finished ICB and privately bottled wine that triggers the imposition of federal excise duty301.

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

141. Australia recalls that where a measure makes origin-based distinctions in relation to internal taxes, "imported and domestic products may be considered "like products", and a case-by-case determination of likeness…[will] be unnecessary"302. Section 135 of the FEA falls squarely within this category. Under subsection 135(2)(a), 100% domestic content is the defining characteristic of wine exempt from excise duty. Specifically, the exemption applies only to wine "produced in Canada and composed wholly of agricultural or plant product grown in Canada".

299 Panel Report, Mexico – Taxes on Soft Drinks, para. 8.44.
300 Australia notes that in US – Malt Beverages measures imposing differential taxation on wine based on whether they were made from local ingredients were found inconsistent with Article III:2. See GATT Panel Report, US – Malt Beverages, para. 5.22.
301 See Panel Report, Mexico – Taxes on Soft Drinks, paras. 8.43-8.45.
302 Panel Report, Colombia – Ports of Entry, para. 7.182.
Thus by definition, packaged wine containing any foreign content, which includes ICB wine produced from imported and Canadian bulk wine, does not qualify for the exemption303.

142. In Indonesia – Autos, the panel considered the Article III:2 consistency of a similar tax distinction. Following the well-established rule regarding origin-based measures304, the panel observed that:

> the distinction between the products for tax purposes is based on such factors as the nationality of the producer or the origin of 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 products305.

143. Following the reasoning in Indonesia – Autos and past WTO cases, a full likeness analysis is unnecessary in respect of the present measure. It is clear from the text of subsection 135(2)(a) that it discriminates purely on the basis of origin to determine eligibility for the excise exemption. Since the content of packaged wine is comprised exclusively of bulk wine inputs, this means section 135(2)(a) discriminates on the basis of the origin of those inputs. Accordingly, it can be presumed that Australian and Canadian bulk wine are "like products" within the meaning of Article III:2, first sentence.

(c) Imported Australian bulk wine is taxed "in excess" of Canadian bulk wine

144. Australia recalls that this element requires establishing that imported products are taxed in excess of like domestic products. Accordingly, to comply with Article III:2, first sentence, a measure must afford imported products "at least identical or better tax treatment"306 than the most-

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304 Panel Reports, Indonesia – Autos, para. 14.113; Columbia – Ports of Entry, para. 7.182; Argentina – Hides and Leather, paras. 11.168–11.170; and China – Auto Parts, para. 7.216.
favoured like domestic products. Compliance is strictly interpreted such that "[e]ven the smallest amount of 'excess'" taxation will be considered "too much".

145. Section 135 of the FEA fails this requirement. As shown above, all Australian bulk wine is indirectly subject to excise under subsection 135(1) while 100% Canadian bulk wine is indirectly exempt from duty under subsection 135(2)(a). Excise applied to finished products containing Australian bulk wine is quantified in Schedule 6 of the FEA and will increase again commensurate with the CPI on 1 April 2020. In contrast, 100% Canadian wine attracts zero excise. Since wine containing Australian content is not entitled to an equivalent tax exemption, or any other favourable tax treatment that would put it on identical or better competitive footing with 100% Canadian wine, Australian bulk wine bears a quantifiable tax burden that Canadian bulk wine does not bear. Accordingly, Australia submits that the requirement for "excess" taxation under Article III:2, first sentence is satisfied.

(d) Conclusion

146. Section 135 of the FEA is a de jure discriminatory excise measure that taxes Australian bulk wine in excess of like Canadian products. From its inception, the measure operated, and was intended to operate, to provide competitive advantages to Canadian wine producers. This is a paradigm case of the kind of measure Article III:2, first sentence of the GATT 1994 was designed to discourage and goes against the "broad and fundamental purpose of Article III … to avoid protectionism in the application of internal tax and regulatory measures". Accordingly, the test for violation of Article III:2, first sentence has been met in relation to Section 135 of the FEA.

3. Alternatively the Federal excise exemption is inconsistent with Article III:4 of the GATT 1994

147. Australia’s primary contention, set out in section IV.B.2 above, is that the federal excise exemption is a discriminatory tax which violates Article III:2, first sentence of the GATT 1994. However, if the Panel finds the federal excise exemption consistent with Article III:2 first sentence,

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309 The soft drink and distribution taxes in *Mexico – Taxes on Soft Drinks* were found to breach the "in excess" requirement for similar reasons. See, Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.53.
Australia alternatively submits that Canada has breached its obligation to provide national treatment in accordance with Article III:4 of the GATT 1994.

148. Subsections 135(1) and 135(2)(a) of the FEA 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. Australia has set out the legal standard for a breach of Article III:4 in section IV.C.1. The following subsections outline how the federal excise exemption satisfies this test.

(a) **Imported Australian bulk wine and Canadian bulk wine are "like" products**

149. As outlined in section IV.C.1(a), "likeness" under Article III:4 is fundamentally about the "the nature and extent of a competitive relationship between and among products"\(^{311}\), assessed according to four traditional criteria: the physical characteristics of the products; end uses; consumer tastes and habits; and the tariff classification of the products. However, it is well established that when a measure distinguishes between products exclusively on the basis of origin, likeness can be presumed for the purposes of Article III:4\(^{312}\) without the need for a comprehensive likeness analysis\(^{313}\). In such cases, it is sufficient to demonstrate "that the measure at issue makes a distinction based exclusively on the origin of the product"\(^{314}\). Significantly, where "likeness" has already been established for the purposes of Article III:2 of the GATT 1994, past panels have confirmed the test for "likeness" is also satisfied for Article III:4\(^{315}\). In *Brazil – Taxation*, the panel observed that

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\(^{311}\) Appellate Body Reports, *EC – Asbestos*, para. 99 and *US- Clove Cigarettes*, paras. 110-111.

\(^{312}\) See e.g. Panel Reports, *Russia – Railway Equipment*, paras. 7.919-7.920; and *Argentina - Import Measures*, para. 6.274 (citing: Panel Reports, *India - Autos*, para. 7.174; *Canada - Wheat Exports and Grain Imports*, para. 6.164; *Canada - Autos*, para. 10.74; *Turkey - Rice*, paras. 7.214-7.216; *China - Auto Parts*, paras. 7.216-7.217 and 7.235; *China - Publications and Audiovisual Products*, paras. 7.1444-7.1447; and *Thailand - Cigarettes (Philippines)*, paras. 7.661-7.662).


\(^{315}\) Panel Reports, *Mexico – Taxes on Soft Drinks*, para. 8.105 and *Brazil – Taxation*, para. 7.208.
the product scope in Article III:4 of the GATT 1994 is broader than that in the first sentence of Article III:2, but not broader than the combined scope of the first and second sentence of Article III:2 together. Therefore, if product likeness exists under Article III:2 of the GATT 1994, first sentence, product likeness will also exist under Article III:4 of the GATT 1994 for the same products at issue\textsuperscript{316}.

150. Australia recalls its arguments in section IV.B.2(b) and submits that since Australian and Canadian bulk wine can be presumed to be like products for the purposes of Article III:2, first sentence, product likeness is also satisfied for Article III:4.

(b) The Federal excise exemption is a law, regulation, or requirement affecting the purchase and use of wine

151. Measures that may fall within the scope of Article III:4 include laws, regulations and requirements affecting the internal sale, offering for sale, purchase or distribution of imported products. The term "affecting" has broad application\textsuperscript{317} and implies a measure has "an effect on"\textsuperscript{318} and operates as a "link between [the] identified types of government action…and specific transactions, activities and uses relating to products in the marketplace"\textsuperscript{319}. Measures that "create incentives or disincentives with respect to the sale, offering for sale, purchase and use of an imported product"\textsuperscript{320} have been found "by definition"\textsuperscript{321} to satisfy this requirement\textsuperscript{322}.

152. As noted above, both the imposition of federal excise duty and excise exemption are regulated by section 135 of the FEA. Section 135 of the FEA is a provision of a Canadian federal government statute and clearly qualifies as an "internal law" for the purposes of Article III:4.

153. Australia submits this law has clear effects on the purchase of Australian bulk wine inputs by conditioning the cost of use. In this case, a wine producer’s decision to use a bulk wine input

\textsuperscript{316} Panel Report, Brazil – Taxation, para. 7.208.
\textsuperscript{318} Panel Report, India – Autos, para. 7.196.
\textsuperscript{320} Panel Report, China – Publications and Audiovisual Products, para. 7.1450.
\textsuperscript{322} Appellate Body Report, China – Auto Parts, paras. 194–195 referred to in Panel Report, Brazil – Taxation, para. 7.194.
necessarily entails a decision to purchase that product. Accordingly, in the present circumstances, a measure affecting the use of a product also "affects" the purchase of that product.

154. In Mexico – Taxes on Soft Drinks, the panel found that the facts supporting its conclusion that the soft drink and distribution tax applied indirectly to imported sweeteners "also support the conclusion that these taxes 'affect' imported sweeteners"323. Australia has similarly argued in section IV.B.2(a)ii that the federal excise measure is an indirect tax on bulk wine inputs and submits that the facts supporting that claim also demonstrate that subsections 135(1) and 135(2)(a) "affect" the use of Australian bulk wine by Canadian wine producers to make ICB wine. Specifically, the availability of the federal excise exemption is contingent on the exclusive use of Canadian bulk wine inputs, while no such benefit accrues if any foreign bulk wine is used in a packaged product324. In effect, the "connection"325 between the federal excise measure and bulk wine for the purposes of Article III:2, first sentence, in this case also establishes the requisite "link"326 between internal law and product use for the purposes of Article III:4.

155. The effects of tax exemptions and similar measures on the activities regulated by Article III have also been examined on several occasions and consistently found to create incentives and disincentives which "affect" the purchase and use of imported and domestic products327. For example, the panel in Brazil – Taxation found that Brazilian ICT programmes, which mandated compliance with certain requirements in order to obtain tax exemptions, were measures affecting the sale, offering for sale or purchase of products within the meaning of Article III:4. It went on to comment:

Furthermore, 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.328

324 See similar reasoning in Panel Report, Mexico – Taxes on Soft Drinks, para. 8.110.
325 Panel Report, Mexico – Taxes on Soft Drinks, para. 8.42.
327 Panel Reports, China – Auto Parts, paras. 7.257; Brazil – Taxation, para. 7.197; and Mexico – Taxes on Soft Drinks, paras. 8.109-8.110 and 8.113; and Appellate Body Reports, China – Auto Parts, paras. 196-197 and US – FSC (Article 21.5 – EC), paras. 212-213.
328 Panel Report, Brazil – Taxation, para. 7.197.
156. In a similar vein, the excise exemption in subsection 135(2)(a) is an economic incentive to produce 100% Canadian packaged wine and therefore purchase and use Canadian bulk wine inputs. At the same time, subsection 135(1) is a disincentive to produce ICB and other privately bottled wines, and therefore purchase and use Australian bulk wine, since wine containing foreign content cannot qualify for the excise exemption under any circumstances. Accordingly, section 135 of the FEA is an internal law which "affects" the purchase and use of Australian bulk wine by Canadian wine producers.

(c) The Federal excise exemption accords less favourable treatment to Australian bulk wine than to Canadian bulk wine

157. Past panels and the Appellate Body have consistently emphasised that the obligation to afford imported products "treatment no less favourable" than like domestic products requires "effective equality of opportunities" rather than securing a particular volume of trade. The relevant test is whether a measure modifies the conditions of competition in a given market to the detriment of imported products. If a measure gives domestic products an actual or potential competitive advantage over imported like products, this amounts to "less favourable" treatment under Article III:4.

158. Assessing the implications of a contested measure must commence with what is "discernible from the design, structure, and expected operation of the measure". Tax measures including exemptions provide particularly clear examples of measures which modify the conditions of competition of regulated products because they alter the relative cost of purchasing and using those products in a quantifiable manner. Products which are subject to tax become relatively more expensive to use while products enjoying a tax exemption become relatively cheaper. This confers clear advantages on the exempt product, modifying the conditions of

329 Appellate Body Reports, EC – Seal Products, para. 5.101 and US – Clove Cigarettes, para. 176.
330 Appellate Body Reports, Korea – Various Measures on Beef, para. 137; EC – Seal Products, para. 5.101; Dominican Republic – Import and Sale of Cigarettes, para. 93; and US – Clove Cigarettes, para. 179.
331 Appellate Body Reports, Dominican Republic – Import and Sale of Cigarettes, para. 93 and Thailand – Cigarettes (Philippines), para. 135.
332 Appellate Body Report, Thailand – Cigarettes (Philippines), paras. 130 and 134.
competition to the detriment of the higher taxed product\textsuperscript{334}. Where that tax measure distinguishes on the basis of origin and gives preferential tax treatment to domestic products, the structure of the measure itself indicates that imported products are treated less favourably\textsuperscript{335}.

159. In the present case, subsections 135(1) and 135(2)(a) of the FEA create a clear regime of tax incentives and disincentives for the purchase and use of domestic and imported bulk wine inputs. Specifically, subsection 135(2)(a) confers a tax exemption on the use of Canadian bulk wine inputs that is not extended to Australian bulk wine.

160. The federal excise exemption is analogous to the soft drink and distribution taxes challenged in \textit{Mexico – Taxes on Soft Drinks}. In that case, the United States argued that a similar tax exemption violated the requirements of Article III:4 as it only applied to soft drinks sweetened with cane sugar (predominantly domestic) and did not extend to soft drinks sweetened with beet and high fructose corn syrup (predominantly imported)\textsuperscript{336}.

161. In accepting the United States’ argument, the panel noted:

These measures have the effect of penalizing the consumption of non-cane sugar sweeteners by industrial producers of soft drinks and syrups. Producers who opt for the use of non-cane sugar sweeteners, such as beet sugar or HFCS, in the preparation of their soft drinks and syrups are subject to the payment of taxes and to the completion of requirements that are not demanded of those producers who use cane sugar instead.

The challenged measures create an economic incentive for producers to use cane sugar as a sweetener in the production of soft drinks and syrups, instead of other non-cane sugar sweeteners such as beet sugar or HFCS. This incentive is created by conferring an advantage (the exemption from the soft drink tax, the distribution tax …) on those producers that use cane sugar instead of non-cane sugar sweeteners, such as beet sugar or HFCS. These measures do not legally impede producers from using non-cane sugar sweeteners, such as beet sugar or HFCS. However, they significantly modify the conditions of competition between cane sugar, on the one hand, and non-cane sugar sweeteners, such as beet sugar or HFCS, on the other…


\textsuperscript{335} See, for example, Appellate Body, \textit{US – FSC (Article 21.5 – EC)}, para. 217. See also Appellate Body, \textit{Thailand – Cigarettes (Philippines)}, paras. 130 and 137 which makes a similar observation in respect of origin-based administrative measures.

The description of the soft drink tax [and] the distribution tax…and the fact that they are imposed only on soft drinks and syrups that contain non-cane sugar sweeteners, leaves no doubt that the soft drinks and syrups sweetened with beet sugar and HFCS are less favourably treated. The measures therefore alter the conditions of competition in the Mexican market in favour of cane sugar and to the detriment of non-cane sugar sweeteners, such as beet sugar or HFCS, according a less favourable treatment to the latter than that accorded to cane sugar.

162. The federal excise measure modifies the conditions of competition to the detriment of Australian bulk wine imported into Canada in the same way as the measures in Mexico – Taxes on Soft Drinks did for soft drinks sweetened with non-cane sugar. As noted above, section 135 of the FEA creates an economic incentive for Canadian wine producers to use Canadian bulk wine instead of purchasing Australian bulk wine. It achieves this by creating an advantage in the form of an excise exemption for the exclusive use of Canadian bulk wine. The advantage here is even clearer than under the measures in Mexico – Taxes on Soft Drinks since section 135(2)(a) discriminates de jure on the basis of origin. While this does not prevent producers from purchasing and using Australian bulk wine, like the soft drink and distribution tax, section 135(1) penalizes those producers who opt to do so.

163. This results in obvious advantages for Canadian bulk wine which modify the conditions of competition to the detriment of Australian bulk wine. By taxing the use of Australian bulk wine while exempting the exclusive use of Canadian bulk wine, the federal excise exemption decreases the relative cost of using Canadian bulk wine inputs. This enhances its cost competitiveness.

164. Increased cost competitiveness has predictable effects on producer purchasing decisions. To save on production costs, Canadian wine producers may abstain from purchasing Australian bulk wine to use in their packaged wines and instead substitute it with Canadian bulk wine to qualify for the excise exemption. This would have the effect of stimulating demand for Canadian bulk wine. However, even if substitution is not economically viable in the short run, the federal excise measure is structured to encourage this long term effect. Since rates of excise duty are indexed to the CPI, the relative cost saving of exclusively using Canadian bulk wine will increase every year, progressively increasing the advantage conferred on Canadian wines.

337 Panel Report, Mexico – Taxes on Soft Drinks, paras. 8.116-8.118. (footnotes omitted)
339 FEA, Exhibit AUS-34, s. 135.1(2).
Following basic economic principles, escalating incentives to use Canadian wine will operate as a long run stimulus on demand, and therefore encourage production. Indeed, growth and increased "competitiveness of vintners of 100% Canadian wine"\textsuperscript{340} were the expected outcomes of implementing the measure.

165. For the above reasons, the federal excise measure confers clear competitive advantages on Canadian wine, modifying the conditions of competition to the detriment of Australian bulk wine. The application of CPI-adjusted rates ensures that distorting effects on the conditions of competition will worsen over time. In short, not only does section 135 of the FEA currently afford less favourable treatment to Australian bulk wine, it will, by structure and operation, progressively afford even less favourable treatment indefinitely into the future.

(d) Conclusion

166. Australia has shown that section 135 of the FEA operates as a discriminatory incentive regime that has, and will increasingly have, detrimental effects on the purchase and use of Australian bulk wine. By exempting the exclusive use of Canadian bulk wine from duty while failing to extend equivalent treatment to the use of Australian bulk wine, section 135 of the FEA creates distortions that affect the competitive relationship between like products. By indexing rates of duty to the CPI, section 135 ensures continuing deterioration of competitive conditions. In short, section 135 of the FEA, by structure and operation, not only gives clear competitive advantages to Canadian wine but will strengthen them into the future by providing permanent shelter from inflationary pressures. Accordingly, the test for violation of Article III:4 of the GATT 1994 has been met in relation to the FEA.

4. The Ontario wine tax is inconsistent with Article III:2, first sentence.

167. Canada has breached its obligation to provide national treatment under Article III:2, first sentence by applying discriminatory rates of wine basic tax on Australian wine. Section 27 of the ACGRPPA applies differential rates of wine basic tax to wine purchased in WRS and wine boutiques depending on whether the product is Ontario or non-Ontario in origin. Since Ontario wines benefit from a reduced rate of taxation under this measure, the wine basic tax constitutes

\textsuperscript{340} Federal Excise Duty on Wine, Exhibit AUS-37; News Release 06-027, Exhibit AUS-38.
excess taxation in clear violation of Article III:2, first sentence. As set out in section IV.B.1, three elements must be satisfied to establish a violation of Article III:2. The following subsections outline how the Ontario wine basic tax satisfies this test.

(a) The Ontario wine tax is an internal tax or other internal charge

i. The obligation to pay the wine basic tax accrues on purchase

168. Australia reiterates its submissions in section IV.B.1(a) that to qualify as an "internal tax or other internal charge" within the scope of Article III:2, first sentence, the obligation to pay tax must accrue to an "internal event"\textsuperscript{341} and a connection, even if indirect, must be established between the tax and product at issue\textsuperscript{342}. The Ontario wine basic tax, with its differential tax structure based on the origin of ingredients, is similar in relevant respects to the federal excise exemption above, and in Australia’s view, warrants a similar legal analysis and conclusion.

169. The wine basic tax is levied on the purchase of wine from WRS and wine boutiques and paid at the time of purchase. A "purchase" is clearly an "internal event"\textsuperscript{343} for the purposes of determining whether a measure constitutes an internal tax. The term is explicitly contained in the text of Article III:1 of the GATT 1994 which gives context to Article III:2\textsuperscript{344}. Accordingly, there is no controversy regarding the characterisation of the wine basic tax. Tax liability accrues due to an internal event – the purchase – satisfying the primary requirement for an internal tax within the meaning of Article III:2, first sentence.

ii. Bulk Australian wine is indirectly subject to tax under sections 27(2) and 27(2.1) of the ACGRPPA

170. For the same reasons set out in section IV.B.2(a)ii relating to the indirect application of federal excise to Australian bulk wine, the wine basic tax also operates as an indirect tax on Australian bulk wine. Like the federal excise measure, the wine basic tax applies differential taxes to finished bottles of wine based on the location of production and origin of ingredients\textsuperscript{345}. As the

\textsuperscript{341} Appellate Body Report, China – Auto Parts, para. 162.
\textsuperscript{342} Panel Report, Mexico – Taxes on Soft Drinks, para. 8.42.
\textsuperscript{343} Appellate Body Report, China – Auto Parts, para. 162.
\textsuperscript{344} Appellate Body Report, Japan – Alcoholic Beverages II, p. 18.
\textsuperscript{345} ACGRPPA, Exhibit-20, s. 27; Ontario Liquor Licence Act, Exhibit AUS-21, s. 1(a).
panel observed in *Mexico – Taxes on Soft Drinks* "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"346.

171. As noted, differential rates of wine basic tax apply depending on the origin of the finished product. In this case, bulk wine is the exclusive input to finished bottles of wine purchased from within the WRS system. Therefore, it is the origin of the bulk wine inputs (i.e. whether the inputs are from Ontario or foreign) that triggers differential liability under section 27 of the ACGRPPA.

172. Australian bulk wine is, by definition, composed of non-Ontario ingredients and therefore will always attract a higher level of tax when eventually purchased in the WRS system as ICB wine. In contrast, Ontario bulk wine, by definition, will attract a much more favourable rate, if it is purchased as a 100% Ontario product. The wine basic tax clearly influences the competitive relationship between Australian and Ontario bulk wine inputs. Accordingly, Australian bulk wine is indirectly subject to tax for the purposes of Article III:2, first sentence.

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

173. The origin-based nature of the wine basic tax is relevant in determining whether Australian and Ontario bulk wine are like products. Australia recalls its submissions at sections IV.B.1(b) and IV.B.2(b) and emphasises that where a tax measure distinguishes between products exclusively on the basis of origin, "imported and domestic products may be considered "like products", and a case-by-case determination of likeness…[will] be unnecessary"349.

174. Once again, the wine basic tax resembles the origin-based federal excise measure and the arguments set out in section IV.B.2(b) above also apply here. Section 27 of the ACGRPPA applies differential taxes on wine purchased from WRS or wine boutiques depending on whether the finished product qualifies as "Ontario" wine or "non-Ontario" wine. Section 1(a) of the Liquor Licence Act defines "Ontario" wine as wine produced in Ontario from 100% Ontario-grown products.

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products. ICB wines – which by definition are composed of less than 100% Ontario content – do not meet this definition and do not benefit from reduced rates of taxation.

175. Australia recalls the panel in Indonesia – Autos noted "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". Thus following the reasoning in Indonesia – Autos and past WTO cases a full likeness analysis is unnecessary for the present measure. The wine basic tax discriminates purely on the basis of origin to determine eligibility for preferential tax treatment. Since the content of finished wine products is comprised exclusively of bulk wine inputs, this means the wine basic tax discriminates on the basis of the origin of those inputs. Accordingly, it can be presumed that Australian and Ontario bulk wine are "like products" within the meaning of Article III:2, first sentence.

(c) Imported Australian bulk wine is taxed "in excess" of Ontario bulk wine

176. Australia refers to its submissions in section IV.B.2(c) and recalls that the test for excess taxation under Article III:2, first sentence is strict. Following the settled interpretations of past panels and the Appellate Body, "[e]ven the smallest amount of 'excess' taxation will be considered "too much" which means imported products must be afforded "at least identical or better tax treatment" to the most-favoured like domestic products.

177. The wine basic tax fails this test. It is clear on the face of section 27 of the ACGRPPA that more favourable rates of wine basic tax are applied to Ontario wine. Ontario bulk wine is indirectly taxed at a lower rate under section 27 of the ACGRPPA provided it is not ultimately bottled in combination with non-Ontario wine. In contrast, Australian bulk wine, by definition non-Ontario in origin, is indirectly subject to a higher rate of tax because it can only be ultimately

350 Ontario Liquor Licence Act, Exhibit AUS-21, s. 1(a); Ontario Beer and Wine Tax, Exhibit AUS-40, p. 5.
351 As outlined in the Factual Background, ICB wines are a blend that included imported bulk wine.
353 Panel Reports, Indonesia – Autos, para. 14.113; Columbia – Ports of Entry, para. 7.182; Argentina – Hides and Leather, paras. 11.168–11.170; and China – Auto Parts, para. 7.216.
358 ACGRPPA, Exhibit AUS-20, ss. 27(1) and 27(2).
purchased as a blended product i.e. ICB wine. Under current proposed rates, ICB wines purchased from a WRS are taxed at 19.1% of the retail price compared to 6.1% for 100% Ontario wine, while purchases from wine boutiques are taxed at 22.6% for ICB wine compared to 9.6% for 100% Ontario wine. This results in an overall tax advantage to 100% Ontario wine of 13% of the retail price in both WRS and wine boutiques. In turn, this clearly translates into a quantifiable indirect tax burden on Australian bulk wine that Ontario bulk wine does not bear.

178. Australia notes the similarity to the measures examined in Mexico – Taxes on Soft Drinks, and preferential excise taxes and exemptions applied to wine produced from local ingredients challenged in US – Malt Beverages, and found inconsistent with Article III:2. Accordingly, Australian wine is taxed in excess of Ontario wine in contravention of Article III:2, first sentence.

(d) Conclusion

179. Section 27 of the ACGRPPA is a de jure discriminatory measure that taxes Australian wine in excess of like Ontario products. Since the 2016 Ontario Budget, the wine basic tax has been structured to systematically increase tax advantages to Ontario wine, creating an ever-widening competitive gap between Ontario wines and their non-Ontario competitors. This goes against the "broad and fundamental purpose of Article III … to avoid protectionism in the application of internal tax and regulatory measures". Accordingly, the test for violation of Article III:2, first sentence of the GATT 1994 has been met in relation to the Ontario wine basic tax.

C. RESTRICTIONS ON IMPORTED WINES ACCESS TO RETAIL SALES OUTLETS IN GROCERY: LEGAL CLAIMS UNDER ARTICLE III:4 OF THE GATT 1994

1. Article III:4 – overview of legal standard

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359 ACGRPPA, Exhibit AUS-20, ss. 27(2) and 27(2.1).
360 These are the rates as proposed under the recent Ontario government Bill amending section 27 of the ACGRRPA. See Wine Basic Tax Amendment Bill, Exhibit AUS-43; Ontario Beer and Wine Tax, Exhibit AUS-40, p. 5.
361 As previously noted, under the rates formally in force under current section 27 of the ACGRRPA, Ontario wines in fact enjoy a 14% and 15.5% advantage in WRS and wine boutiques respectively. Australia reiterates that the 13% tax advantage argued here represents the most conservative illustration of the discriminatory treatment imposed by the wine basic tax.
363 Appellate Body Report, Japan – Alcoholic Beverages II, p. 16.
180. The national treatment provision in Article III:4 GATT 1994 is a cornerstone of the GATT/WTO multilateral trading system. It provides:

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...

181. The Appellate Body has clarified that there are three elements that must be satisfied to establish a violation of Article III:4: (i) the imported and domestic products at issue are "like products"; (ii) the measure at issue is a "law regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use" of the products at issue; and (iii) the treatment accorded to imported products is "less favourable" than that accorded to the like domestic products.

(a) "like products"

182. The first element of Article III:4 requires an assessment of whether the relevant domestic and imported products are "like". The Appellate Body has said that "likeness" in Article III:4 is fundamentally about the "the nature and extent of a competitive relationship between and among products". The Appellate Body and panels have used the following four criteria as a framework to analyse whether domestic and imported products are "like" on a case-by-case basis: (i) the physical properties, nature and quality of the products i.e. the physical characteristics of the products; (ii) the end-uses of the products (the extent to which products are capable of performing the same, or similar, functions); (iii) consumers’ tastes and habits (consumers’ perceptions and behaviour) in respect of the products; and (iv) the tariff classification of the products. These four criteria serve as tools to assist in assessing likeness under Article III:4, and panels must determine whether the evidence as a whole indicates that the products in question are "like".

365 Appellate Body Reports, EC – Seal Products, para 5.99; Thailand – Cigarettes (Philippines), para. 127; and Korea – Various Measures on Beef, para. 133.
183. However, it is also well-established in WTO jurisprudence that where a measure distinguishes between products exclusively on the basis of their origin, likeness can be presumed for the purposes of Article III:4, without the need to examine all of the likeness criteria set out above\(^ {369} \). For example, in *Canada – Wheat Exports and Grain Imports* the panel stated:

> 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 (emphasis added)\(^ {370} \).

184. This means that it is sufficient for a complaining party to establish "likeness" for the purposes of Article III:4 "by demonstrating that the measure at issue makes a distinction based exclusively on the origin of the product,“\(^ {371} \) without the need to compare specific products or examine the various likeness criteria\(^ {372} \).

**b) "law regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use"**

185. The Appellate Body has found that the word "affecting" in this element of Article III:4 has a "broad scope of application"\(^ {373} \). It implies a measure that has "an effect on"\(^ {374} \) and operates as a "link between identified types of government action ('laws, regulations and requirements') and specific transactions, activities and uses relating to products in the marketplace ('internal sale, offering for sale, purchase, transportation, distribution or use')“\(^ {375} \).

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\(^{374}\) Panel Report, *India – Autos*, para. 7.196.

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

(c) "treatment no less favourable"

187. The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal taxes and internal regulatory measures. Toward this end, Article III obliges Members to provide equality of competitive conditions for imported products in relation to domestic products. As the Appellate Body has said, this article is concerned with protecting expectations of equal competitive relationships between products.

188. It is well-established that the third element of Article III:4 (that imported products be afforded "treatment no less favourable" than domestic products) requires "effective equality of opportunities" for imported products to compete with like domestic products. This element requires an examination of whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products. In other words, as the Appellate Body in Dominican Republic – Import and Sale of Cigarettes explained, "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."  

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376 Panel Report, Canada – Autos, para. 10.80.
378 Appellate Body Report, Japan – Alcoholic Beverages II, p. 16.
379 Appellate Body Report, Japan – Alcoholic Beverages II, p. 16.
380 Appellate Body Report, Japan – Alcoholic Beverages II, p. 16; referred to in Appellate Body Report, Korea – Alcoholic Beverages, para. 120.
383 Appellate Body Report, Dominican Republic – Import and Sale of Cigarettes, para. 93. (emphasis added)
189. The implications of a contested measure for the equality of competitive conditions are "first and foremost, those that are discernible from the design, structure, and expected operation of the measure". This analysis does not require empirical evidence of the actual effects of the measure at issue in the market. As the panel highlighted in *Russia – Railway Equipment* "[e]vidence of actual trade effects, whether favourable or unfavourable, is not necessary to establish "less favourable" treatment under Article III:4. Article III protects competitive opportunities of imported products and not trade flows". Consequently, a complainant is not required to show actual adverse trade effects of a measure on the market; showing potential competitive disadvantages is sufficient to establish that a measure is inconsistent with Article III:4.

190. Article III:4 provides that "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 the like products of national origin. Therefore, the treatment to be compared for the "treatment no less favourable" analysis, is the treatment accorded to the like products imported from the complaining Member, in this case Australia, as compared to the ("most-favoured") like domestic wine.

191. Relevant examples of the types of measures that have previously been found by WTO panels or the Appellate Body to offer inequality of competitive conditions to imported products include:

   a. Requirements that result in imported products having access to fewer retail sales outlets than domestic products.

   b. Requirements establishing two separate retail systems for imported and domestic products that reduced the commercial opportunity to reach, and generate sales to, consumers.

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387 See e.g. Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 135.
388 See IV.A.3 of this Submission.
389 Appellate Body Report, *US – Clove Cigarettes*, para. 190 (in the context of "less favourable treatment" under Article 2.1 of the TBT Agreement).
390 GATT Panel Report, *Canada – Provincial Liquor Boards (US)*, paras. 5.6 – 5.7.
c. Differential tax regime on two groups of soft drinks, where soft drinks sweetened with cane sugar were not subject to tax, while soft drinks sweetened with non-cane sugar were taxed\(^{392}\).

2. The Ontario grocery measures are inconsistent with Article III:4 of the GATT 1994

192. The Ontario grocery sales measures, as described in section III.B.1 above, are inconsistent with Article III:4 GATT 1994 because they accord to imported products treatment less favourable than the treatment accorded to "like" domestic products. There are two aspects to the measures that govern the sale of wine in grocery stores in Ontario i) grocery store authorizations and ii) wine boutiques. Australia will establish that both aspects of the measures modify the conditions of competition between imported Australian bottled wine and domestic Ontario bottled wine as, separately and in combination, both aspects of the measures 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 under the measures.

193. The grocery store authorizations aspect of the measures appear, on their face, to allow imported bottled wines access to grocery stores. However, as Australia will demonstrate below, the design, structure, and expected operation of the conditions for eligibility under those authorizations is such that domestic wines qualify for sale in grocery stores under those conditions, while imported like Australian bottled wines are excluded from qualifying.

194. With respect to the wine boutique aspects of the measures, these explicitly treat imported bottled wine differently to domestic wines as imported bottled wines are entirely excluded from access to wine boutiques operating in grocery stores.

195. As set out in section IV.C.1, three elements must be satisfied to establish a violation of Article III:4. The following subsections outline how the Ontario grocery measures satisfy this test.

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

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196. As set out in section IV.C.1(a) above, the Appellate Body has said that "likeness" in Article III:4 is fundamentally about the "the nature and extent of a competitive relationship between and among products". The Appellate Body and panels have used four criteria as a framework to analyse whether domestic and imported products are "like" on a case-by-case basis. As is described below, Australian bottled wine and domestic Ontario bottled wine have similar physical characteristics, have the same end-uses, consumers consider them to be inter-changeable and they have the same tariff classification. Australian bottled wine and Ontario bottled wines are therefore "like" for the purposes of Article III:4. This is similar to the finding in Japan – Alcoholic Beverages I, that imported and Japanese unsweetened still wine were like products for the purposes of Article III:2, because they had similar properties, end-uses and uniform tariff classifications.

i. Imported bottled wine and domestic Ontario bottled wine have the same physical characteristics

197. Wine, whether imported or domestic has the same physical characteristics. Wine is an alcoholic beverage made from fermentation of grapes, or grape juice. Wine, whether domestic or imported, is thus made of the same raw materials – fermented grapes or grape juice and the final product is very similar. For example, the Ontario Liquor Licence Act defines wine as "any beverage containing alcohol in excess of the prescribed amount obtained by fermentation of the natural sugar contents of fruits including grapes...". The Wine Australia Act 2013 defines "wine" in a similar fashion as "an alcoholic beverage produced by the complete or partial fermentation of fresh grapes or products derived solely from fresh grapes, or both..."

198. The presentation and packaging of bottled domestic and bottled imported wine are virtually identical. Wine is generally packaged in a glass bottle that is usually 750ml, with either a screw top lid or a cork. Domestic wines and imported bottled wines look similar, are packaged in a similar fashion, have similar alcohol content and are made from the same raw materials.

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395 GATT Panel Report, Japan – Alcoholic Beverages I.
396 Ontario Liquor Licence Act, Exhibit AUS-21, s. 1.
397 Wine Australia Act 2013 (Cth), Exhibit AUS-79, s. 4.
398 Examples of domestic and imported wine available for sale on the LCBO website, Exhibit AUS-80.
199. In finding that imported and domestic still wines were "like", the GATT panel in Japan – Alcoholic Beverages I agreed that "minor differences in taste colour and other properties" did not disqualify products from being like.\textsuperscript{399} Accordingly, while there may be some variations in grape variety, aroma and taste between different types of wine, this does not mean that imported and domestic wine are not like products. These variations can exist within domestic wines as well as within imported wines\textsuperscript{400}.

200. The GATT panel in Spain – Tariff Treatment of Unroasted Coffee considered that "organoleptic differences" from geographical factors, cultivation, processing and genetic factors were not sufficient for different tariff treatment for different types of coffee given that "it was not unusual in the case of agricultural products that the taste and aroma of the end-product would differ"\textsuperscript{401}. The panel in that case also found relevant that unroasted coffee was "universally regarded as a well-defined and a single product intended for drinking."\textsuperscript{402} Similarly, a bottle of wine is regarded as a single product for drinking that is the same, irrespective of the origin of the wine.

\begin{itemize}
\item[ii.] Imported Australian bottled wine and domestic bottled wine have the same end-uses
\end{itemize}

201. In EC – Asbestos, the Appellate Body described end-uses as "the extent to which products are capable of performing the same, or similar, functions"\textsuperscript{403}. Imported wine has the same end use as domestic wine. Wine is purchased by consumers as an alcoholic beverage to be drunk in private and social settings. This function is reflected in the dictionary definitions of wine, which makes no distinction based on origin, for example: "the fermented juice of the grape used as a beverage"\textsuperscript{404} and "an alcoholic drink which is made from grapes"\textsuperscript{405}.

\begin{itemize}
\item[399] GATT Panel Report, Japan - Alcoholic Beverages I, para. 5.6
\item[400] See for example, Examples of domestic and imported wine available for sale on the LCBO website, Exhibit AUS-80.
\item[401] GATT Panel Report, Spain – Tariff Treatment of Unroasted Coffee, paras. 4.4-4.11. (emphasis added)
\item[402] GATT Panel Report, Spain – Tariff Treatment of Unroasted Coffee, para. 4.7.
\item[403] Appellate Body Report, EC – Asbestos, para 117.
\item[404] The Oxford English Dictionary, 2nd ed, (Oxford University Press, 1989) p 2321. (emphasis added)
202. This is analogous to the situation in *Philippines – Distilled Spirits* where the panel found that all distilled spirits, irrespective of their origin or of the raw materials used in their production had the same end-uses in the Philippines, described as "thirst quenching, socialization, relaxation, pleasant intoxication"\(^{406}\). Similarly, the GATT panel in *Japan – Alcoholic Beverages I* recognised that "gin, vodka, whisky, grape brandy, other fruit brandy, certain 'classic' liqueurs, still wine and sparkling wine, respectively, were recognized not only by governments for purposes of tariff and statistical nomenclature, but also by consumers to constitute 'each in its end-use...a well defined and single product intended for drinking"\(^{407}\). The same is true of domestic and imported wine in this case. Accordingly, the end-use for bottled wine, that is, to be consumed as alcoholic drink, is the same irrespective of its origin.

**iii. Consumer tastes and habits**

203. The Appellate Body has described consumer tastes and habits as the extent to which consumers are willing to use the products to perform the same functions or end-uses\(^{408}\). As "likeness" is fundamentally about the competitive relationship between products, the extent to which consumers are or would be willing to choose one product instead of another to perform the same end-use is important in assessing likeness\(^{409}\).

204. Australia has established that domestic and imported wine have the same physical characteristics and end-uses. Consumers are willing to fulfil that same end-use by consuming either Australian or domestic bottled wine inter-changeably. For example, a 2013 report on consumer trends in beer, wine and spirits from the Canadian Agriculture and Agri-Food Department notes that in Canada "there is demand for wine from various brands and regions in the world…New wines from the United States (US), New Zealand, Australia and Latin America have also become popular among consumers"\(^{410}\). The PAC Report also evidences that consumers are willing to choose imported wines over domestic wines, noting that imported wines "are very

\(^{406}\) Appellate Body Report, *Philippines – Distilled Spirits*, para. 113 quoting the Panel Reports, para. 2.38 (quoting European Union's first written submission to the Panel, para. 64).

\(^{407}\) GATT Panel Report, *Japan – Alcoholic Beverages I*, para. 5.6.

\(^{408}\) Appellate Body Report, *EC - Asbestos*, para. 117.

\(^{409}\) Appellate Body Report, *EC - Asbestos*, para. 117.

\(^{410}\) Agriculture and Agri-Food Canada, *Consumer Trends, Wine, Beer and Spirits in Canada*, September 2013, Exhibit AUS-81, pp. 4-5.
Canada – Measures Governing the Sale of Wine
Australia’s First Written Submission (DS537) 10 May 2019

popular amongst Ontarians” and have a "favourable position" in the Ontario marketplace.411. This shows that consumers in Ontario perceive imported and domestic wine as substitutable.

205. The LCBO website provides examples of the types of wines available to consumers to purchase in the Ontario market. The presentation and marketing of imported and domestic wines on the LCBO website is uniform, with each presented with a description of the tasting notes of the wine and in some cases a suggestion of the type of food that the wine is best paired with.412 Many of the descriptions of both imported and domestic wines are similar and use the same tasting characteristics. Examples of Australian and domestic wines on the website also show that there are a range of varieties of imported wines and domestic wines available for sale at a range of different price points.413

206. Moreover, it is evident that imported and domestic Ontario wines are in a competitive relationship in the Ontario marketplace based on wine sales in the market. Imported wine has a significant share of the wine market in Ontario, and directly competes for retail sales against domestic wine. For example, an LCBO presentation from 2016 identifies that Ontario wines have a 23% total wine market share in Ontario, while imported wines combined make up most of the rest of the market, with Australian wines holding a 9% share.414 The LCBO reports in its annual reports on the market share of domestic and imported wine. For example, in its report for 2017 the LCBO reported that imported wine sales at the LCBO had a 57.7% share of the total wine market in Ontario, while domestic Ontario wine sales at the LCBO had a 25.1% share.415 This evidences that consumers are willing to choose imported wines over domestic wines in the Ontario market. There is undoubtedly a competitive relationship between imported and domestic wine in the Ontario wine market.

iv. Imported wine and domestic wine have the same tariff classification

207. Imported wine and domestic wine have the same tariff classification. Under the Harmonised Tariff Classification System, wine is classified at the four-digit level under the

411  PAC Report, Exhibit AUS-17, pp. 4 and 6.
412  Examples of domestic and imported wines available for sale on the LCBO website, Exhibit AUS-80.
413  Examples of domestic and imported wines available for sale on the LCBO website, Exhibit AUS-80.
414  Shari Mogk-Edwards, Wine at LCBO, 3 October 2016, Exhibit AUS-82.
subheading 22.04 "wine of fresh grapes, including fortified wines...". Heading 22.04 is sub-divided into sub-headings: 2204.10 Wine; sparkling; 2204.21 Wine; still, in containers holding 2 litres or less; 2204.22 Wine; still, in containers holding more than 2 litres but not more than 10 litres; 2204.29 Wine; still, in containers holding more than 10 litres.

208. Distinctions are therefore made at the six-digit level for the size of the wine containers, but this is regardless of the origin of the wine. None of these distinctions are based on the origin of the wine.

(b) The Ontario grocery sales measures are laws, regulations or requirements affecting the internal sale, offering for sale, purchase and distribution of wine in Ontario

209. The Ontario grocery sales measures are laws, regulations or requirements affecting the internal sale, offering for sale, purchase and distribution of imported wine in Ontario. Before the Ontario grocery sales measures were introduced, under Ontario laws wine was not permitted to be sold in grocery stores in Ontario, and WRS outlets were not permitted to be operated inside grocery stores and sell additional VQA wines. The Ontario grocery sales measures are the legal means by which wine is permitted to be sold in grocery stores in Ontario. The Ontario grocery sales measures have been created and implemented under Regulation 232/16, which is clearly a "law" or "regulation" within the scope of the Article III:4.

210. 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.

(c) The Ontario grocery measures accord less favourable treatment to imported Australian bottled wine than that accorded to like domestic wine

211. The Ontario grocery measures accord less favourable treatment to imported products than the treatment granted to like domestic products. Australia refers back to section IV.C.1(c), which

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416 See World Customs Organization, *Harmonized Systems Nomenclature* (2017 ed.), at Chapter 22 (Beverages, spirits and vinegar)
sets out the legal standard. As explained in that section, the assessment under this element ultimately turns on whether the Ontario measures "modify the conditions of competition in the relevant market to the detriment of imported products". As already explained, this Article obliges Members to provide effective equality of competitive opportunities for imported products in relation to domestic products. Article III:4 prevents Members from applying measures in a manner that affect the competitive relationship of products in the marketplace such that the measure "afford[s] protection to domestic production". Australia recalls that the Appellate Body has found that where a measure "gives domestic like products a competitive advantage in the market over imported like products" it accords less favourable treatment to the like imported product.

212. The Appellate Body in US – Clove Cigarettes also clarified that the national treatment obligation "does not require Members to accord no less favourable treatment to each and every imported product as compared to each and every like domestic product," as what is to be compared is the treatment given to the group of imported products as a whole as compared to the group of like domestic products. The panel in EC – Seals also highlighted that:

…the Appellate Body in US – Clove Cigarettes clarified that the fact that a small group of imported products was exempted from the ban in question was not considered relevant when assessing the ban's overall impact on the vast majority of imported products vis-à-vis the majority of like domestic products.

213. The Appellate Body has said that a formal difference in treatment between imported and like domestic products is not necessary to establish a violation of Article III:4. This is because a measure may be de facto discriminatory by in practice altering competitive conditions in a manner that is adverse to imported products.

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418 See Section IV.C.1 of this Submission.
419 Appellate Body Report, EC – Asbestos, para 98.
420 Appellate Body Report, Dominican Republic – Import and Sale of Cigarettes, para 93.
422 Panel Report, EC – Seal Products, para. 7.163.
423 Appellate Body Report, Korea – Various Measures on Beef, para. 137.
214. As discussed in section III.B.1 above, the Ontario grocery sales measures have two aspects that permit the sale of wine in grocery stores which will be addressed in turn under this element: i) grocery store authorizations and ii) wine boutiques.

   i. Grocery store authorizations

215. As set out in section III.B.1(a), Regulation 232/16 permits wine to be sold in grocery stores under two types of authorizations – restricted and unrestricted – which place certain conditions on the sale of wine in grocery stores. Conditions under restricted authorizations only allow certain wine to be sold in those grocery stores, while unrestricted authorizations provide for a shelf-space limitation on certain wine. As will be discussed in the following sections, the conditions in Regulation 232/16 for restricted and unrestricted authorizations de facto discriminate against imported Australian bottled wines by granting like domestic Ontario wines access to grocery stores under all of those conditions while operating to exclude or restrict like Australian wines access to grocery stores.

   a. The conditions under restricted authorizations favour domestic wine and exclude like imported wine from accessing grocery stores

216. 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, as defined in the legislation. If wine does not meet either of these conditions, it cannot be sold in restricted grocery stores.

217. The measures ostensibly allow both domestic and imported wines to be sold in restricted grocery stores provided the wine meets the defined criteria. However, as set out below, in reality because of the design, structure, and operation of those criteria, like domestic Ontario wines qualify under both of the criteria, while no like Australian wines can qualify under the quality assurance criteria and most Australian wine is unlikely to gain access under the "small winery" criteria.

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424 See Figure 1.
425 Regulation 232/16, Exhibit AUS-41, s. 22.
218. Under Regulation 232/16, wine can qualify for sale only if: 1) it is from a "small winery" or 2) it is both from a "mid-size winery" and is "quality assurance wine" (the "quality assurance" criteria). "Quality assurance wine" is defined as "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".

219. This "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 litres of wine annually). This criteria, by its design, structure and operation, limits access to grocery store outlets to wine from a small statutory appellation of origin regime. This favours domestic wine under Canada's existing smaller provincial-based regime and excludes all Australian wine. This is demonstrated by the way this criteria applies and operates in fact with respect to Australia's statutory appellation of origin regime as compared to Ontario's existing appellation regime explained in the following paragraphs.

220. Wine Australia (previously the Australian Grape and Wine Authority) administers the statutory appellation of origin rules in Australia by maintaining the Register of Geographical Indications (GIs) and Other Terms, and ensuring the truth of claims made about origin though the Label Integrity Program under the Wine Australia Act 2013. Under this legislation, Australia has established a national appellation of origin regime, through protected Australian wine GIs.

221. Wine Australia has asked the LCBO (who is responsible for interpreting and applying Regulation 232/16) to confirm its suitability as a certifying body for Australian wines/wineries for the purpose of Regulation 232/16. Despite many designated Australian wine regions producing less than the 50 million litre threshold, the LCBO advised Wine Australia that Australia's appellation of origin regime is excluded from qualifying under the "quality assurance" criteria in

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426 Regulation 232/16, Exhibit AUS-41, s. 43(2).
427 Regulation 232/16, Exhibit AUS-41, s. 43(1).
428 Regulation 232/16, Exhibit AUS-41, s. 22(1).
429 Regulation 232/16, Exhibit AUS-41, s. 1.
430 Ibid.
431 Wine Australia Act, Exhibit AUS-79, ss. 40ZC and 40ZD.
432 Australia's Wine Regions, Exhibit AUS-85.
433 Australia's wine production by state and region (source: Australian Grape and Wine Incorporated & Wine Australia), Exhibit AUS-84.
Regulation 232/16 because of the amount of wine certified. The reason for ineligibility given by the LCBO was because under this criteria of the Regulation "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". Australia has a nation-wide appellation of origin regime that would certify, in the aggregate, more than 1.25 billion litres of wine annually – Wine Australia would therefore be certifying in the aggregate far in excess of 50 million litres. The design and application of this criteria in Regulation 232/16 thus excludes all like Australian wine from qualification. Thus as assessed by the LCBO, Australia's appellation regime does not qualify under the "quality assurance" definition despite many of Australia's wine regions producing less than 50 million litres annually.

222. In short, no Australian wine is eligible to qualify under the "quality assurance" criteria because of the design of this criteria and the way that it applies to exclude Australian wine.

223. In contrast, this criteria does not exclude like domestic Ontario wines under Ontario's existing appellation of origin regime as such wine can meet the "quality assurance" criteria. Indeed, it appears that this criteria may have been designed with the Ontario VQA system in mind. In Ontario, the Ontario VQA Act establishes Ontario's appellation of origin system for VQA wine. The VQA Ontario is the authority that regulates the appellation of origin regime under the VQA Act. According to VQA Ontario, in the year ending March 2018 VQA Ontario certified 28.8 million litres and in the 2017 year 25.7 million litres i.e. less than 50 million litres of wine annually. Accordingly, Ontario's VQA appellation of origin regime evidently qualifies under the "quality assurance" criteria. This means that all Ontario VQA wine meets the "quality assurance" criteria and can qualify for sale in grocery stores under this criteria. This appears to be confirmed by LCBO materials that outline the process for identifying eligible Ontario wines for grocery. In an LCBO presentation from July 2016 for Ontario wine, slide 41 identifies that for "Quality Assurance wine" a "VQA certificate [is] required."
224. The effect of the design and operation of the "quality assurance" criteria is that no Australian wines from a "mid-size winery" can access restricted grocery stores under this criteria, as no Australian wine can meet the "quality assurance" criteria. In contrast, all like domestic Ontario wines certified under Ontario's appellation of origin regime from "mid-sized wineries" qualify and thus can access these grocery outlets under the criteria that wine be "quality assurance" from a "mid-sized winery". This means that no like Australian wine has any access to restricted grocery stores under this criteria, whereas like Ontario wines can access these stores under this criteria. Therefore, the condition that wine be "quality assurance wine" (in addition to being from a mid-size winery) through its design, and operation excludes like Australian wines from these retail outlets, while providing favourable access to domestic wine. This difference in access to retail outlets results in a detrimental impact on the competitive opportunities to like Australian wine.

225. While in theory Australian wine could access restricted grocery stores under the remaining "small winery" criteria, in reality the number of Australian small producers who export their wines to Ontario for sale in grocery stores is limited. This is because many Australian small wineries are unlikely to export their wines. An Australian report surveying small winemakers reveals that Australian small winemakers sell the vast majority of their wine domestically (on average 86%), and only account for 10% of all export sales value and 3% of export sales volume in Australia. This can be contrasted with the Australian wine sector as a whole in which 40% of wine is sold domestically and 60% is exported. Larger Australian wineries export a greater proportion of their production. This demonstrates that more Australian wines exported to the Ontario market are likely to be from larger wine producers. This demonstrates that in practice, it is likely that most imported Australian wines will not benefit from access under the "small winery" criteria.

226. Moreover, even if some Australian wines could, in theory, gain access to grocery stores under the "small winery" criteria, this does not change the fact that all Australian wines are

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440 Defined in Regulation 232/16, Exhibit AUS-41, s. 43.
441 Wine Australia, Small Winemaker Production and Sales Survey Report 2016-2017, November 2017, Exhibit AUS-88. This survey defined small winemakers as those crushing up to 500 tonnes. 83% of survey respondents were wineries producing less than 170,000 litres of wine. The largest number of respondents was in the 0- 15,000 litres of wine segment (42%).
442 Ibid.
excluded under the other condition to access restricted grocery stores (that the wine be "quality assurance" from a "mid-size" winery), as Australia has already demonstrated in the previous paragraphs. This is similar to the Panel's reasoning in \textit{EC – Seal Products} that, based on the Appellate Body's guidance in \textit{US – Clove Cigarettes}, the possibility that some imported products could enter the domestic market did not change the fact that the majority of the imported products in question were excluded\footnote{Panel Report, \textit{EC – Seal Products}, para. 7.163. See also para. 7.168.}.

227. Based on the analysis above, the conditions for accessing grocery stores with restricted authorizations as a whole operate to exclude Australian wines from access as compared to the access afforded to like domestic products. Limiting wines that can qualify for sale in restricted grocery stores to wine that is "quality assurance wine" (in addition to being from a "mid-size" winery) and wine from a "small winery", as defined in Regulation 232/16, excludes like Australian wines from access to these grocery stores. In contrast, like domestic Ontario wines can access these grocery store outlets under both the "small winery" criteria and the "quality assurance" criteria. This difference in access granted to domestic wines under the conditions in the Regulation modifies the conditions of competition to the detriment of Australian wine.

228. This more favourable access to grocery store outlets affords like domestic wines greater opportunity to reach consumers and generate sales in these grocery stores as compared to Australian wine. Accordingly, Australian wines do not have equality of competitive opportunities as compared to like domestic wines.

\textit{b. The conditions under unrestricted authorizations favour domestic wines and restrict access to grocery stores for imported wine}

229. Any imported and domestic wine can be sold in grocery stores holding unrestricted authorizations (unrestricted stores). Regulation 232/16 mandates that \textit{at least 50\%} of the available shelf-space on the grocery sales floor for wines must be reserved for wine that is\footnote{See section III.B.1(a) above. Regulation 232/16, Exhibit AUS-41, s. 25(2).}:

\begin{itemize}
  \item from a "small winery"; or
\end{itemize}
• "quality assurance wine"\textsuperscript{445} from a "mid-sized winery"; or

• from a small wine producing country, being a country where the grapes were grown that produces in the aggregate, less than 150 million litres of wine annually from grapes grown in that country (small country production criteria).

230. Similar to the analysis under restricted authorizations, Australia will demonstrate below that the design, structure, and expected operation of those criteria is such that all domestic Ontario wines will qualify, while like imported Australian wines are excluded under these criteria. As discussed above, both the "quality assurance" and "small winery" criteria benefit domestic Ontario wines as compared to like Australian wine\textsuperscript{446}. As already established, no Australian wine can qualify for access in these grocery outlets under the "quality assurance" criteria. The final condition for unrestricted authorizations requires that wine be from a small wine producing country. The design, structure, and expected operation also favours domestic wine, while excluding imported wine from Australia, which is a major wine exporting country to Ontario.

231. This production criteria requires that wine be from a country where the grapes were grown that produces in the aggregate, less than 150 million litres of wine annually from grapes grown in that country. Canada produces less than this amount annually – according to data from Canadian Vintners Association Canada produced 65 million litres in 2017\textsuperscript{447}. Australia and other major exporting countries all produce more than the 150 million litre threshold. In the 2016-2017 financial year the top four wine exporters of bottled imported wine to Canada were Italy, US, France and Australia respectively\textsuperscript{448}. According to an LCBO presentation from 2016, these four countries also held the largest share of the total wine market in Ontario\textsuperscript{449}. All of these exporting countries produce well over 150 million litres in wine annually\textsuperscript{450}. According to the Organisation Internationale de la Vigne et du Vin (OIV), in 2016 Australia produced 1.25 billion litres, and in 2017 Australia produced 1.39 billion litres\textsuperscript{451}. This is obviously far in excess of the 150 million

\textsuperscript{445} Regulation 232/16, Exhibit AUS-41, s. 1.
\textsuperscript{446} See section IV.C.2(c).a above.
\textsuperscript{447} Canadian Vintners Association, WWTG Wine Production (Million Litres), 2017, Exhibit AUS-89.
\textsuperscript{448} Canadian Vintners Association, Bottled Wine imports to Canada 2013-2017, Exhibit AUS-90.
\textsuperscript{449} Shari Mogk-Edwards, Wine at LCBO, 3 October 2016, Exhibit AUS-82, p. 35.
\textsuperscript{450} OIV, 2016 & 2017 Global Economic Vitiviniculture Data, Exhibit AUS-91. According to the OIV, in 2017 Italy was the top country by production, producing 50.9 mhl; followed by France 45.2 mhl; Spain 39.3 mhl; US 23.6 mhl and Australia 13.9 mhl.
\textsuperscript{451} Ibid.
threshold set in Regulation 232/16. This means that no wine from Australia can qualify under this production criteria.

232. The small country production criteria, as designed, thus operates in fact to exclude all Australian wine from qualifying under this criteria, whereas all domestic wines qualify under this criteria.

233. As Australia has demonstrated above, no like Australian wine can qualify under the "quality assurance" criteria. This leaves only the "small winery" criteria that Australia wines could, in theory, qualify for access under. However as already explained, above, in practice it is likely that most imported Australian wine will not benefit from access under this criteria.

234. The consequence of the three criteria, taken together, under unrestricted authorizations is that as all domestic wines qualify (as wines from a small wine producing country), like domestic wines are not subject to any shelf-space restrictions in unrestricted grocery stores. In contrast, as Australia has demonstrated, the design of the conditions is such that no like Australian wine can qualify under the "quality assurance" criteria, or the small country production criteria. Consequently, as a result the majority of like Australian wines would be excluded from 50% of the available shelf-space in grocery stores under the Regulation on the basis that they cannot in fact meet either the "quality assurance" or the wine production criteria. Essentially, the criteria through design and expected operation limit Australian wines access to shelf-space, while permitting all like domestic wine to have unrestricted access to shelf-space in these grocery outlets.

235. Through this shelf-space restriction, like imported wines will be subject to a permanent limitation on access to consumers in unrestricted grocery stores, as compared to like domestic wine. Hence, imported wines will have fewer opportunities to reach customers in grocery stores and generate sales as a result of this limitation on shelf-space. In contrast, domestic Ontario wines in unrestricted groceries can access more shelf-space, meaning more domestic wine can be displayed in store and therefore domestic wine would have more opportunities to reach more consumers and benefit from more sales opportunities in these stores. This modifies the conditions of competition to the detriment of imported wine.

c. Requirement to display a sign indicating the availability of
domestic (VQA) wine
236. Under both classes of authorization, where Ontario VQA wine (100% Ontario wine) is sold the Regulations 232/16 also mandate that the grocery store must have at least one sign indicating the availability of VQA wine. This mandatory promotional requirement for domestic wine confirms that a key feature of the new grocery measures is to promote domestic products over imported products. There is no requirement in the legislation to indicate the availability of imported wine. The only purpose of this requirement is to advertise and promote Ontario VQA wine in the store, which could have a positive effect on sales of VQA wine. No such benefit is conferred to imported wine under Regulation 232/16. This confirms that the fundamental thrust and effect of the measures is to provide competitive advantages to domestic Ontario wine in the new grocery channel to the detriment of imported wine.

d. Conclusion

237. In sum, Australia has demonstrated 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 conditions, while on the whole like Australian bottled wines cannot qualify under the "quality assurance" criteria or the country production criteria and would be unlikely to benefit from access under the "small winery" criteria. The consequence of this is that like Australian wines have less access to grocery stores as a result of the conditions in the Regulation 232/16 as compared to the access to grocery stores afforded to like domestic wine. This reduces like Australian wines' opportunities to reach and generate sales to consumers in these grocery stores as compared to like domestic wines. Accordingly, the conditions under Regulation 232/16 for both restricted and unrestricted grocery authorizations discriminate against Australian wine in violation of Article III:4.

238. This conclusion is supported by the disproportionate market share that VQA wine already enjoys in the grocery channel, making up around half of all grocery store wine sales, as compared to the 7% share VQA has in the LCBO retail channel. The far larger market share that domestic wine enjoys in the grocery sales channel than the LCBO retail channel, and compared to the relative shares of imported wine in these channels, suggests that the Ontario

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452 Regulation 232/16, Exhibit AUS-41, s. 24.(2) and
453 See Section III.B.1(c) of this submission. Carolyn O'Grady-Gold, LCBO Sales Trends and Insights Presentation, 2018, Exhibit AUS-55, p. 14.
454 See III.B.1(c) of this submission.
grocery measures have operated to increase sales of domestic wine in grocery stores. This is a strong indicator that the measures do in fact operate to provide domestic wines with favourable access to grocery stores. The sales data reveals that there is evidently demand for imported wines in the Ontario marketplace. The Ontario grocery measures are artificially impacting on the opportunity for imported wines to compete equally with domestic wines in this channel by restricting the access of imported wines to grocery stores.

ii. The Ontario grocery sales measures reserve grocery store outlets for sales of domestic Ontario wine only through wine boutiques

239. This aspect of Regulation 232/16 formally treats imported bottled wine differently to domestic Ontario wine by excluding imported bottled wine from being sold in grocery stores through wine boutiques. As described in sections II.B.2 and III.B.1(b) above, only wines made in Ontario can be sold in grocery stores through wine boutiques. Imported wine that is bottled outside of Ontario is entirely excluded from retail sales in these grocery stores through wine boutiques. In contrast, domestic Ontario wine bottled in Ontario, including VQA wine, can be sold in wine boutiques. The measures therefore provide domestic wines with access to additional grocery sales outlets that imported bottled wines are entirely excluded from.

240. As noted above, the government intends that up to 150 off-site WRS outlets be permitted to move into grocery stores as wine boutiques. There are currently 68 in operation (70 licences have been issued)\textsuperscript{455}. The Ontario government intends that ultimately, under the Regulation a total of 300 grocery stores would be permitted to sell wine through both wine boutiques and grocery store authorizations, with 150 reserved for wine boutiques in grocery stores\textsuperscript{456}. The wine boutiques aspect of the measures would therefore reserve half of the total intended number of grocery stores outlets in Ontario exclusively for sales of wine made in Ontario. This would exclude imported bottled wines from a significant portion of available sales outlets in the new lucrative grocery sales channel. As has been recognised by the LCBO, the grocery sales channel has a competitive

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\textsuperscript{455} Grocery Update November 2018, Exhibit AUS-52, p. 5.
\textsuperscript{456} See III.B.1(b) of this Submission. Wine Coming to Grocery Stores Across Ontario, Exhibit AUS-45, p. 1.
\end{flushleft}
advantage over other sales channels, in the form of the convenience of purchasing alcohol and food at the same time\textsuperscript{457}.

241. Permitting WRS outlets to move into grocery stores as wine boutiques and expanding the assortment of domestic wines that can be sold in these outlets, while retaining the prohibition on imported bottled wines sales in these outlets is a significant change to the previous system. This move undoubtedly alters the conditions of competition to the detriment of imported wine. As only wines made in Ontario can be sold in wine boutiques in grocery stores, imported bottled wines have access to fewer grocery sales outlets as compared to domestic wine. Therefore imported wines have fewer sales and marketing opportunities than domestic wine in grocery stores in Ontario.

242. This is also analogous to the situation in \textit{Canada– Provincial Liquor Boards (US)}\textsuperscript{458}, in which the GATT panel found that allowing access of domestic beer to points of sale not available to imported beer denied competitive opportunities imported beer\textsuperscript{459}. Similarly in the present case, allowing domestic wines access to additional grocery sales outlets through wine boutiques that are not available to imported wines denies competitive opportunities to imported wine. The exclusion of like imported bottled wine from wine boutique sales denies competitive opportunities to imported wines in breach of Article III:4.

\textbf{(d) Conclusion}

243. Under the Ontario grocery measures the only route to grocery stores for imported bottled wine is through stores holding grocery authorizations. Australia has demonstrated that the design, structure, and operation of the legislated conditions under which imported wines can access those grocery stores excludes like Australian wine from accessing these stores under the majority of the criteria, as compared to like domestic wine which is eligible to qualify under all of the criteria. In addition, the measures also reserve additional access to grocery store outlets through wine boutiques for domestic Ontario wines only, while excluding like imported bottled wine. The Ontario grocery measures, through both the grocery store authorizations and the wine boutiques, operating separately and in combination, provide domestic Ontario wines with preferential access

\textsuperscript{458} \textit{Canada– Provincial Liquor Boards (US)}, GATT Panel Report, para. 5.5
\textsuperscript{459} Ibid.
to grocery store outlets while limiting imported wines access to grocery store outlets. These measures therefore accord "less favourable" treatment to like imported wine in breach of Article III:4.

244. This favourable access granted to domestic wines under the Ontario grocery sales measures grants remarkable opportunities to domestic wine in the new grocery channel that are not granted to imported wine. The grocery sales channel has competitive advantages over other retail sales channels and is likely to generate high volumes of domestic wine sales as this channel grows in the future\textsuperscript{460}.

3. The Quebec grocery measures are inconsistent with Article III:4 of the GATT 1994

245. The Quebec grocery measures discriminate on a \textit{de jure} basis between like imported and domestic wine. By design and operation, the measures permit only domestic Quebec wines from small-scale producers with direct access to retail sale outlets in grocery and convenience stores, while like imported bottled wines are not afforded any access to these sales outlets. The Quebec grocery measures, as described in section III.B.2 above, are inconsistent with Article III:4 of the GATT 1994 because they accord to imported products treatment less favourable than the treatment accorded to "like" domestic products. As set out in section IV.C.1, three elements must be satisfied to establish a violation of Article III:4. The following subsections outline how the Quebec grocery measures satisfy this test.

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

246. As set out in section IV.C.1(a), it is well-established in WTO jurisprudence that where a difference in treatment between domestic and imported products is based exclusively on the origin of the products likeness can be presumed for the purposes of Article III:4\textsuperscript{461}. The Quebec measures are based exclusively on the origin of the wine. By definition, the Quebec measures permit only

\textsuperscript{460} See Section II.C of this Submission
Quebec small-scale producers to sell their bottled wine directly to grocery and convenience stores. Qualifying wine is defined solely by reference to the origin of the wine as the wine must meet the following conditions:\footnote{Small-scale wine producer Regulation, Exhibit AUS-58, s. 18.}

- at least 50% must be the permit holder’s own grapes, fresh or processed;
- no more than 15% of fresh or processed grapes, grape juice or grape must concentrate can come from outside Quebec; and
- the remainder may consist of fresh or processed grapes produced by another Quebec farm producer.
- From the vintage year 2022, the permit holder must make his wine from fresh or processed grapes that are 100% Quebec grown, of which at least 50% comes from the permit holder’s own fresh or processed grapes.

Evidently, under the Quebec measures small-scale production permit holders must be Quebec producers that produce wine in Quebec made from Quebec raw materials. Accordingly, where wine is not made and bottled in Quebec from products of Quebec origin it does not qualify for sale under the measures. Imported bottled wine therefore does not qualify precisely because of its origin. As the only factor that determines whether the wine can be sold in grocery and convenience stores is the origin of the wine (it must be produced in Quebec), Quebec domestic wine that qualifies under the legislation and imported wine can be presumed to be "like" products for the purposes of Article III:4, without needing to undertake a full likeness analysis.

In any event, if a full likeness analysis is conducted under the traditional likeness criteria, imported bottled wine and Quebec wine are "like" because bottled imported and Quebec wine have the same physical characteristics, have the same end-uses, consumers consider them to be interchangeable and they have the same tariff classification. This assessment is the same as the analysis for the Ontario grocery measures set out in Section IV.C.2(a) and the Nova Scotia measures set out in Section IV.D.1(b).

(b) The Quebec grocery measures are laws, regulations or requirements affecting the internal sale, offering for sale, purchase and distribution of wine in Quebec
249. The Quebec grocery measures are laws, regulations or requirements affecting the internal sale, offering for sale, purchase and distribution of imported wine in Quebec. The Quebec measures created a new type of permit - the small-scale producers permit - which permits these producers to sell their own qualifying wine directly to grocery and convenience store permit holders in Quebec. The Quebec grocery measures are therefore the legal means by which these Quebec producers are permitted to sell their wine in grocery and convenience stores in Quebec. As described in section III.B.2, the Quebec measures were implemented through Quebec legislation under Bill 88, which amended relevant legislation and regulations in Quebec that govern the internal sale and distribution of wine in Quebec. This is clearly a "law" or "regulation" for the purposes of Article III:4.

250. The Quebec grocery measures directly govern and regulate the distribution to and the internal sale of wine in grocery and convenience stores in Quebec, by mandating how the wine can be distributed to grocery and convenience stores and what type of wine can be sold in grocery and convenience stores. Accordingly, the Quebec grocery measures evidently "affect" the "internal sale, offering for sale, purchase and distribution" of imported and domestic wine.

(c) The Quebec grocery measures accord less favourable treatment to imported Australian bottled wine than that accorded to like domestic wine

251. The Quebec grocery measures accord less favourable treatment to imported products than the treatment granted to like domestic products. As set out in IV.C.1(c) this assessment ultimately turns on whether the Quebec grocery measures "modify the conditions of competition in the relevant market to the detriment of imported products". This Article obliges Members to provide equality of competitive conditions for imported products in relation to domestic products. As set out in IV.C.1(c) the implications of an impugned measure for the equality of competitive conditions are "first and foremost, those that are discernible from the design, structure, and expected operation of the measure".

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463 See Section IV.C.1(c) of the submission; Appellate Body Report, EC – Seals, para. 5.101.
464 Ibid.
465 Appellate Body Report, Thailand – Cigarettes (Philippines), para. 130.
252. In line with previous WTO and GATT case law, the treatment that must be accorded to imported wine is treatment "no less favourable" than the treatment granted to the "most-favoured" domestic products\(^{466}\) – in this case Quebec wine that qualifies under the measures. The Quebec grocery sales measures explicitly treat like imported wine differently to domestic wine. The Quebec measures permit only Quebec small-scale wine producers to distribute and sell their wines directly in grocery and convenience stores in Quebec. Like imported bottled wine brands are not granted this same access to grocery and convenience stores and instead are entirely excluded from accessing these retail outlets. Therefore, all like Australian wines that are bottled in Australia and imported to Quebec are prohibited from sales in the grocery and convenience store channel. In contrast, this channel has been opened up to local Quebec wine producers and their wines under the measures. The measures thus operate to permit Quebec qualifying wines (small-scale producers' wines) to be sold in grocery and convenience stores in Quebec, but does not afford this treatment to like imported bottled wines.

253. This difference in treatment afforded by the Quebec measures as between like imported wine and domestic wine modifies the conditions of competition in the Quebec market to the detriment of imported wine.

254. Firstly, the measures give like domestic Quebec wines access to additional points of sale in grocery and convenience stores that like imported wines do not have access to. As a result of the measures, Quebec small-scale wines have access to over 9,000 retail sales outlets in grocery and convenience stores\(^{467}\), in addition to SAQ outlets (these Quebec wines can be sold in both grocery stores and the SAQ outlets\(^{468}\)). Imported bottled wines are excluded from this important new retail channel and are limited to sales in SAQ outlets, a maximum of around 840 retail outlets\(^{469}\). Like imported bottled wines therefore have access to significantly fewer retail sales outlets than like domestic wines, giving imported wines fewer sales and marketing opportunities than domestic wine. Similar to the finding in Korea – Various Measures on Beef, this presents like

\(^{466}\) See Section IV.A.3 of the submission.
\(^{467}\) Canada's State Trading Notification, Exhibit AUS-5, p. 29.
\(^{468}\) Canada's State Trading Notification, Exhibit AUS-5, p. 29.
\(^{469}\) USDA GAIN Report, Exhibit AUS-27.
imported wines with dramatically less "commercial opportunity to reach, and hence generate sales to consumers"\(^{470}\) in the Quebec market as compared to the like domestic wines.

255. This measure is analogous to the Canadian measures considered in Canada – Provincial Liquor Boards (US)\(^{471}\). In that case, in the majority of Canadian provinces imported beer had access to fewer points of sale than domestic beer as domestic brewers had access to retail outlets in which imported beer could not be sold. In fact, the example provided in that case was Quebec, where domestic beer could be sold in 11,238 licensed grocery stores while only 337 liquor-board stores were available for the sale of imported beer\(^{472}\). The panel found that by allowing access of domestic beer to points of sale not available to imported beer, Canada accorded domestic beer competitive opportunities denied to imported beer. The Quebec measure under consideration in Australia's case is the of the same type and operates in the same way. For the same reasons, it is clear that through the Quebec measure, which allows access of qualifying Quebec wine access to retails sales outlets not available to like imported wine, Canada accords domestic wine competitive opportunities denied to imported wine.

256. Secondly, in addition to providing Quebec wines access to grocery sales outlets that are denied to imported wine, the measures also permit Quebec producers to transport and sell their wines directly\(^{473}\) to grocery and convenience stores without going through the SAQ distribution system. As noted above, it appears that these Quebec wines are therefore not subject to the SAQ mark-ups (in 2018 the SAQ mark-up was 41.1%) and charges\(^{474}\). These Quebec wine producers can thus direct deliver wines to grocery and potentially negotiate with grocers on commercial terms with respect to sales of their wines, including the ability to negotiate any retail mark-up.

257. Imported bottled wines, on the other hand, cannot be delivered directly by the producer to the retailer. Foreign producers have no choice but to import their wines through the SAQ distribution system for sale in SAQ retail outlets, where they are subject to the SAQ fixed fees and SAQ mark-up.

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\(^{470}\) Appellate Body Report, Korea – Various Measures on Beef, para. 145.

\(^{471}\) GATT Panel Report, Canada – Provincial Liquor Boards (US).

\(^{472}\) GATT Panel Report, Canada – Provincial Liquor Boards (US), para 5.5

\(^{473}\) SAQ Act, Exhibit AUS-26, s. 24.1(3).

\(^{474}\) See section II.B.3 of this submission. SAQ Annual Report 2018, Exhibit AUS-16, p. 33.
The ability to direct deliver wines to retailers and the exemption from the SAQ mark-ups can be expected to afford competitive advantages to qualifying Quebec wines that are not afforded to imported wine. The exemption from the fixed SAQ mark-up could offer advantages in terms of pricing and profits to Quebec wines in grocery and convenience stores. Quebec producers could have the opportunity to negotiate any retail mark-ups with grocers, and the mark-up could be lower than the SAQ mark-up. The mark-up is ultimately reflected in the retail price of wine, and therefore a lower mark-up could allow a Quebec wine to be priced at a lower retail price. In line with basic economic principles, a lower price could drive more demand and hence sales of domestic wine as compared to like imported wine. For example, an industry article identifies that "[t]he fact that Quebec wines can now be sold directly in groceries and convenience stores without going through the SAQ is without a doubt a major breakthrough. That is because the SAQ normally applies a huge, even astronomical margin on the wines it sells". That article also notes that avoiding the SAQ mark-up could allow Quebec wine to have a "lower[ing] [the] retail price, thereby benefiting consumers and increasing sales and volume". This competitive advantage is denied to imported wine, which cannot bypass the fixed SAQ mark-ups.

The ability to bypass the SAQ distribution system and deliver wines directly to grocery store retailers, without having to use a middle-man (i.e. the SAQ), also offers potential advantages to domestic wines as local winemakers have the opportunity to market and deliver their products directly to retailers. Imported wines do not have this same opportunity. In US – Malt Beverages, the panel recognised that the ability to ship domestic beer and wine directly from an in-state producer to the retailer, while imported beer and wine was required to go through an in-state wholesaler, denied competitive advantages to imported beer and wine. In making this finding, the Panel noted that "...the wholesale level represents another level of distribution which in-state product is not required to use". The same reasoning applies in this case. Imported wines must be imported through the SAQ distribution system, whereas qualifying Quebec wines can sell directly to grocery stores (or to the SAQ). Imported wines are thus subject to an additional

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476 Ibid.
distribution level, with the consequential costs of that (SAQ mark-up, and other fees), which is not imposed on Quebec wines choosing to sell their wines directly to grocery and convenience stores.

260. Australia has demonstrated above that the Quebec measures, by permitting qualifying Quebec wines to be sold directly to grocery and convenience stores modify the conditions of competition to the detriment of imported wine. Under the measures, like domestic wines are granted more sales opportunities to access consumers through access to significantly more retail sales outlets in the new grocery channel, potential price advantages, and the opportunity to market and deliver their wines directly to retail outlets. None of these advantages are provided to like imported wine. Consequently imported wine is afforded treatment that is less favourable than that granted to like domestic wine.

(d) Conclusion

261. The formally different treatment granted by the Quebec grocery measures to "like" imported and domestic wine modifies the conditions of competition in the Quebec market to the detriment of imported products. This is evident from the design, structure and expected operation of the measures, which exclusively grant Quebec small-scale wine producers' domestic wine direct access to sales in grocery and convenience stores in Quebec. This same access to those retail outlets is not afforded to like imported wines. Therefore, the Quebec measures accord treatment that is "less favourable" to like imported wines. Consequently, the Quebec grocery measures are inconsistent with Article III:4 of the GATT 1994.

262. The conclusion that the design, structure and expected operation of the measures favours domestic Quebec wines in breach of Article III:4 is confirmed by statements of the Quebec government\textsuperscript{479}. In a press release issued by the Quebec Minister for Finance, on 20 December 2016, Minister Leitao stated that the changes:

…open[s] the door to the sale of Québec small-scale wines in grocery stores, we are meeting the expectations expressed by producers over the past several years, by providing them with a legislative framework tailored to today’s realities…

…Québec’s wine and alcoholic beverage industry is growing, so it was essential to modernize our legislation in order to support industry producers by opening up new sales outlets that will enable them to increase their visibility and expand as they deserve in all regions…480 (emphasis added)

263. This Quebec government statement reveals that the very purpose of introducing the measures was to support domestic wine producers and their products through the provision of new retail sales outlets for domestic wines. This is precisely the type of measure that the drafters of Article III aimed to prohibit, given that the fundamental aim of the article is to avoid protectionism481.

D. DISCRIMINATORY MARK-UPS: LEGAL CLAIMS UNDER ARTICLE III:2 AND III:4

1. The Nova Scotia reduced product mark-up is inconsistent with Article III:2, first sentence

264. The reduced product mark-up (described in section III.C) afforded to domestic Nova Scotia wines through the Emerging Wine Regions Policy discriminates against imported wine in breach of Article III:2, first sentence of the GATT 1994. The product mark-ups on wine applied by the NSLC are an internal charge on products within the scope of Article III:2. Australia will demonstrate that domestic Nova Scotia wine is afforded a reduced mark-up rate to retail price of 43% through the Emerging Wine Region Policy, while the majority of like imported Australian bottled wine is subject to a higher rate of 140%. Like Australian bottled wine is therefore subject to a charge in excess of that applied to domestic Nova Scotia wine in breach of Article III:2, first sentence of the GATT 1994. As set out in section IV.B.1, three elements must be satisfied to establish a violation of Article III:2, first sentence. The following subsections outline how the Nova Scotia product mark-ups satisfy this test.

480 Quebec Press Release, Exhibit AUS-57.
481 Appellate Body Report, Japan – Alcoholic Beverages II, p. 16.
(a) The Nova Scotia product mark-ups are an internal tax or other internal charge

265. Australia refers to section IV.B.1(a) and recalls that in *China – Auto Parts*, the Appellate Body said that taxes or charges will be "internal" within the scope of Article III:2 where the "obligation to pay them is triggered by an "internal" factor" (after the importation of the product)\(^ {482}\). An example of an internal event in that case was the distribution or re-sale of the product\(^ {483}\).

266. Article III:2, first sentence covers both "internal taxes" and "other internal charges of any kind". In *Argentina – Hides and Leather*, the panel emphasised that Article III:2 covers "charges of any kind", and found that the word "charge" denoted (among other things) a "pecuniary burden" and a "liability to pay money laid on a person"\(^ {484}\).

267. The GATT panel case *Canada – Provincial Liquor Boards (US)*\(^ {485}\), is illustrative here. In that case, the panel considered the applicability of Article III to Canadian provincial liquor board mark-ups on products. The Panel found that Article III:2 applied not only to the provincial and federal sales taxes but also to the mark-ups levied by the provincial liquor boards "because they also constituted internal governmental charges borne by products"\(^ {486}\).

268. The NSLC mark-ups under consideration here are of the same type as in that case and can be characterized in the same way. Similar to that case, the NSLC product mark-ups are "internal governmental charges borne by products".  

269. The product mark-up is applied by the NSLC, acting under legislative authority (see to section II.B.4). The mark-up represents the difference between the retail price of wine and the amount paid to producers for their product.\(^ {487}\) The retail price of the wine that a consumer pays for must include this mandatory product mark-up, and wine cannot be sold internally through the NSLC retail outlets without the application of the mark-up. The mark-up can therefore be

\(^{482}\) Appellate Body Report, *China – Auto Parts*, para. 161.  
\(^{483}\) Appellate Body Report, *China – Auto Parts*, para. 162-163.  
\(^{487}\) Amendments to Clarify Retail Sales Markup Allocation, Exhibit AUS-60.
characterized as a "pecuniary burden" and an "internal governmental charge" borne by the wine. Thus, in line with the previous GATT and WTO panel findings, the mark-up is a "charge" within the scope of Article III:2.

270. The mark-up is also clearly "internal" as the mark-up is included in the retail price of wine by the NSLC for the purposes of the internal retail sale of the wine in NSLC outlets (the retail sale of imported wine in the internal market occurs after its importation)\(^488\). The mark-up therefore accrues due to an "internal event", the internal retail sale of the wine. Accordingly, the mark-up is an "internal charge" within the meaning of Article III:2.

(b) Domestic Nova Scotia wine and imported Australian bottled wine are "like products"

271. As set out in section IV.B.1(b), the Appellate Body has held that whether imported and domestic products are "like" within the meaning of Article III:2, first sentence is "fundamentally, a determination about the nature and extent of a competitive relationship between and among imported and domestic products"\(^489\). As explained in IV.B.1(b) likeness has been assessed by examining four traditional criteria. As explained below, imported bottled wine and domestic Nova Scotia wine have similar physical characteristics, have the same end-uses, consumers consider them to be inter-changeable and they have the same tariff classification. Imported and domestic Nova Scotia wines are therefore "like" for the purposes of Article III:2, first sentence. This is similar to the finding in Japan – Alcoholic Beverages I, that imported and Japanese unsweetened still wine were like products for the purposes of Article III:2, because they had similar properties, end-uses and uniform tariff classifications\(^490\).

272. The Policy draws an arbitrary distinction based on whether wine is from an "emerging wine region" or not as defined in the Policy. Whether wine is produced in an "emerging wine region" or is produced in other regions does not affect "likeness" according to any of the four likeness criteria. That is, classification of wine as being from an "emerging wine region" or not has no

\(^{488}\) See, e.g. Canada's State Trading Notification, Exhibit AUS-5, p. 22, point F.


\(^{490}\) GATT Panel Report, Japan – Alcoholic Beverages I, para. 5.6.
bearing on the physical characteristics of the wine, the end-uses of the wine, consumer tastes or habits or tariff classification. This is similar to the finding in *US – Malt Beverages*, where the GATT panel found that the scale of the beer producer, whether a small or large producer, did not affect the likeness of the domestic and imported beer\(^{491}\).

i. the products' physical characteristics

273. The physical characteristics of imported and domestic Nova Scotia wine are the same. Wine, whether imported or domestic has the same physical characteristics. Wine is an alcoholic beverage made from fermentation of grapes, or grape juice. This is evident in the definition of wine in both Canadian and Australian legislation. The NS LCA defines "wine" in section 2(aa) as including "any alcoholic beverage obtained by the fermentation of the natural sugar contents of fruits, including grapes..."\(^{492}\). The *Wine Australia Act 2013* defines "wine" similarly as "an alcoholic beverage produced by the complete or partial fermentation of fresh grapes or products derived solely from fresh grapes, or both, and includes a grape product declared by the regulations to be wine for the purposes of this Act"\(^{493}\).

274. The presentation and packaging of bottled domestic and imported wine are similar. Wine is generally packaged in a glass bottle that is usually 750ml, with either a screw top lid or a cork. The bottles are similar sizes and generally made out of the same materials. This is evidenced by the similar presentation of wines of different origins for sale on the NSLC website\(^{494}\).

275. In finding that imported and domestic still wines were "like", the GATT panel in *Japan – Alcoholic Beverages I* agreed that "minor differences in taste, colour and other properties" did not disqualify products from being like\(^{495}\). Accordingly, while there may be some variations in grape variety, colour, aroma and taste between different types of wine, this does not mean that imported and domestic wine are not like products. These variations can exist within domestic wines as well as within imported wines.

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\(^{491}\) GATT Panel Report, *US – Malt Beverages*, para. 5.19.

\(^{492}\) NS LCA, Exhibit AUS-14, s. 2(aa).

\(^{493}\) Wine Australia Act, Exhibit AUS-79, s. 4.

\(^{494}\) Examples of wines available for sale on the NSLC website, Exhibit AUS-93.

\(^{495}\) GATT Panel Report, *Japan - Alcoholic Beverages I*, para. 5.6
276. The GATT panel in *Spain - Unroasted Coffee* considered that "organoleptic differences" from geographical factors, cultivation, processing and genetic factors were not sufficient for different tariff treatment for different types of coffee given that "it was not unusual in the case of agricultural products that the taste and aroma of the end-product would differ" (emphasis added)\(^496\). The panel in that case also found relevant that unroasted coffee was "universally regarded as a well-defined and a single product intended for drinking." Similarly, a bottle of wine is regarded as a single product for drinking that is the same, irrespective of the origin of the wine.

277. Accordingly, wine produced in Nova Scotia and wine produced elsewhere has similar physical properties.

   ii. Domestic Nova Scotia wine and imported Australian wine have the same end-uses

278. In *EC – Asbestos*, the Appellate Body described end-uses as "the extent to which products are capable of performing the same, or similar, functions"\(^497\). Imported wine has the same end use as domestic wine. Wine is purchased by consumers as an alcoholic beverage to be drunk in private and social settings. This function is reflected in the dictionary definitions of wine, for example: "the fermented juice of the grape used as a beverage" (emphasis added)\(^498\) and "an alcoholic drink which is made from grapes" (emphasis added)\(^499\).

279. This is analogous to the situation in *Philippines – Distilled Spirits* where the panel found that all distilled spirits, irrespective of their origin or of the raw materials used in their production had the same end-uses in the Philippines, described as "thirst quenching, socialization, relaxation, pleasant intoxication"\(^500\). Similarly, the GATT Panel in *Japan – Alcoholic Beverages I* recognised that "gin, vodka, whisky, grape brandy, other fruit brandy, certain 'classic' liqueurs, still wine and sparkling wine, respectively, were recognized not only by governments for purposes of tariff and statistical nomenclature, but also by consumers to constitute 'each in its end-use…a well defined

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\(^{496}\) GATT Panel Report, *Spain - Unroasted Coffee*, paras. 4.4-4.11.

\(^{497}\) Appellate Body Report, *EC – Asbestos*, para 117.


\(^{500}\) Appellate Body Report, *Philippines – Distilled Spirits*, para. 113 quoting the Panel Reports, para. 2.38 (quoting European Union’s first written submission to the Panel, para. 64).
and single product intended for drinking”. The same is true in this case. Accordingly, the end-use for bottled wine, that is, to be consumed as alcoholic drink, is the same irrespective of its origin.

iii. **Consumer tastes and habits**

280. The Appellate Body has described consumer tastes and habits as the extent to which consumers are willing to use the products to perform the same functions or end-uses. As "likeness" is fundamentally about the competitive relationship between products, the extent to which consumers are or would be willing to choose one product instead of another to perform the same end-use is important in assessing likeness. Australia has established that domestic and imported wine have the same physical characteristics and end-use. Australia submits that consumers in Nova Scotia are willing to fulfil that same end-use by consuming either imported or domestic wine interchangeably. For example, a 2013 report on "Consumer Trends" form the Canadian Agriculture and Agri-Food Department notes that in Canada "there is demand for wine from various brands and regions in the world…New wines from the United States (US), New Zealand, Australia and Latin America have also become popular among consumers".

281. Statistics reported by the NSLC also reveal that imported wines compete directly with domestic wine for sales in the Nova Scotia market. On the NSLC website, both domestic and imported wine are marketed and described in a similar manner. The NSLC organises wines, irrespective of origin, under various "taste profiles" (e.g. "Rich & Full", "Aromatic & Vibrant") as a guide for consumers to discover tastes and find wines. It provides a quiz to consumers based on these profiles to "learn about the flavours and tastes that appeal most to you". There are also similarities across the "flavours" used to describe the wines presented (e.g. "dry", "mineral", "vanilla") and the suggested food pairings across both domestic and imported wines. The NSLC

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504 Agriculture and Agri-Food Canada, *Consumer Trends, Wine, Beer and Spirits in Canada*, September 2013, Exhibit AUS-81, p. 4-5.
505 See paragraph 110 above.
507 Examples of domestic and imported wines available for sale on the NSLC website, Exhibit AUS-93.
also advertises imported wines as alternatives to domestic wine by providing recommendations of wines that a consumer "may also like" under listings of a wine. This evidences that imported wine and domestic wines are interchangeable from a consumer perspective.

iv. **Domestic Nova Scotia wine and imported wine have the same tariff classification**

282. Imported wine and domestic wine have the same tariff classification. Under the Harmonised Tariff Classification System, wine is classified at the four-digit level under the subheading 22.04 "wine of fresh grapes, including fortified wines...". Heading 22.04 is subdivided into sub-headings: 2204.10 Wine; sparkling; 2204.21 Wine; still, in containers holding 2 litres or less; 2204.22 Wine; still, in containers holding more than 2 litres but not more than 10 litres; 2204.29 Wine; still, in containers holding more than 10 litres.

283. Distinctions are therefore made at the six-digit level for the size of the wine containers, but this is regardless of the origin of the wine. No distinction is made in tariff classification based on the origin of the wine.

(c) **Imported Australian wine is taxed or charged in excess of the like domestic wine**

284. As Australia will demonstrate, the measures at issue subject like imported wine to a significantly higher product mark-up (of 140%) than that applied to like domestic Nova Scotian wines (43%). Domestic Nova Scotia wines are afforded this lower mark-up through the Emerging Wine Regions Policy. This difference in mark-up is inconsistent with Article III:2, first sentence.

285. Australia recalls, as set out in IV.B.1(c), that the prohibition of discriminatory taxes and charges in Article III:2, first sentence, is not conditional on a "trade effects test" nor is it qualified by a *de minimis* standard. Under this provision, even the smallest amount of "excess" is too

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508 Ibid.
509 See World Customs Organization, *Harmonized Systems Nomenclature* (2017 ed.), at Chapter 22 (Beverages, spirits and vinegar)
mucha. Furthermore, the purpose of Article III:2, first sentence is to ensure the equality of competitive conditions between imported and like domestic products.

286. In Argentina – Hides and Leather, the panel emphasised that Article III:2 requires a comparison of actual tax burdens between domestic and imported products:

> [i]t is necessary to recall the purpose of Article III:2, first sentence, which is to ensure "equality of competitive conditions between imported and like domestic products". Accordingly, Article III:2, first sentence, is not concerned with taxes or charges as such or the policy purposes Members pursue with them, but with their economic impact on the competitive opportunities of imported and like domestic products. It follows, in our view, that what must be compared are the tax burdens imposed on the taxed products.

We consider that Article III:2, first sentence, requires a comparison of actual tax burdens rather than merely of nominal tax burdens.

287. The Emerging Wine Region's Policy on its face appears to apply a reduced mark-up to wines based on whether they meet the emerging wine region criteria as defined in the Policy. However, a measure that appears to be origin-neutral may nevertheless give rise to de facto discrimination by in practice subjecting imported products to a higher tax burden.

288. As established in the factual section above (III.C.1), it is evident that the NSLC in fact applies the Policy such that all domestic Nova Scotia wines are afforded the reduced 43% mark-up.

289. The volume threshold in the Policy for qualification as an emerging wine region - that total annual production of wine within the political boundaries (state, province, or equivalent) of

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511 Appellate Body, Japan – Alcoholic Beverages II, page 23.
512 See for example: Appellate Body Report, Canada – Periodicals, p. 18; Panel Report, Thailand – Cigarettes (Philippines), para. 7.609.
513 Panel Report, Argentina – Hides and Leather, para. 11.182.
515 See e.g. Panel Report, Philippines – Distilled Spirits, para. 7.89. Australia also notes that in the context of the Article III:2, second sentence claim (dissimilar taxation), the Panel relied on the statement of the Panel in Chile – Alcoholic Beverages, that it was "sufficient to find that certain of the imports are taxed dissimilarly compared to certain of the domestic substitutable products" (para. 7.97) in finding that there was no need to find that all domestic and imported products are dissimilarly taxed: see para. 7162.
516 See Section III.C.1 of this Submission. See also, NSLC Mark-up Spreadsheet, Exhibit AUS-63.
the region does not exceed 50,000HL annually - is set so low that virtually all Australian wine is excluded from qualifying. There are 65 wine regions within Australia's states and territories (which represent the political boundaries of those regions at the state level)\textsuperscript{517}. Based on wine production data from the Australian industry, only 2 of those 65 wine regions (in the state of Queensland) could qualify under the Policy. This is because Queensland, is the only jurisdiction that produces less than 50,000HL annually\textsuperscript{518}. All other wine producing regions fall within the states (the political boundaries) of New South Wales, South Australia, Victoria, Tasmania and Western Australia, which all produce more than 50,000HL of wine annually and thus would not qualify under the Policy. New South Wales, Victoria, South Australia and Western Australia are also the jurisdictions from where the majority of Australian wine imported to Canada comes from\textsuperscript{519}. Queensland's exports of wine to Canada are miniscule – according to data Queensland exported 120,000 litres to Canada in 2018 (not all of which would go to Nova Scotia, and in previous years even less, in fact in most years none at all)\textsuperscript{520}. Therefore the amount of imported Australian wine that could, in theory, qualify under the Policy would be extremely limited.

290. Thus, the criteria of the Policy that a region can only qualify as an emerging region where the annual production of the political boundaries of the region is less than 50,000HL excludes all like Australian wine from the vast majority of Australia's wine regions from accessing the reduced mark-up. Moreover, based on the most recent data available from the Australian wine industry, 92\% of all Australian wine production is ineligible to qualify under the Policy\textsuperscript{521}. This is because 19 Australian wine regions produce 92\% of all of Australia's wine, and all of those regions produce more than 50,000HL (regardless of their political boundaries)\textsuperscript{522}.

291. Therefore, in fact virtually all Australian wine imported to Nova Scotia is ineligible for the reduced mark-up, because the vast majority of wine that Australia produces and exports to Canada does not come from an "emerging wine region" as defined in the Policy. It would thus be subject to the much higher 140\% mark-up. In contrast, Nova Scotia meets the emerging wine region

\textsuperscript{517} Australia's Wine Regions, Exhibit AUS-85.
\textsuperscript{518} Australia's wine production by state and region, Exhibit AUS-84.
\textsuperscript{519} Australian State & Territory Wine Exports to Canada, Exhibit AUS-95.
\textsuperscript{520} Australian State & Territory Wine Exports to Canada, Exhibit AUS-95.
\textsuperscript{521} Australia's wine production by state and region, Exhibit AUS-84.
\textsuperscript{522} Australia's wine production by state and region, Exhibit AUS-84.
criteria as it produces less wine in the aggregate than 50,000HL annually\textsuperscript{523}, meaning that all like domestic Nova Scotia wines qualify under the Policy for the reduced mark-up, and do in fact enjoy the reduced mark-up\textsuperscript{524}.

292. Accordingly, while the Policy appears, on its face, to be origin neutral, the evidence supports a classic case of \textit{de facto} discrimination. All domestic Nova Scotia wines are granted the lower mark-up of 43%. In comparison, as Australia has demonstrated, virtually all like imported Australian wines is not eligible for the reduced markup and accordingly would be subject to a much higher mark-up of 140%. The Policy therefore in fact discriminates against Australian wine by imposing a pecuniary burden on imported wines that is significantly "in excess" of that on like domestic products. Consequently, imported wine is subject to a charge in excess of like domestic wine contrary to Article III:2, first sentence of the GATT 1994.

293. Past panels and the Appellate Body have indicated that evidence of the objective of the measure may be considered to confirm the protective application of a measure\textsuperscript{525}, particularly where "the explicit objective of the measure is that of affording protection to domestic production"\textsuperscript{526}. In this case, the evidence\textsuperscript{527} also overwhelmingly demonstrates that the Emerging Wine Regions Policy was introduced to support the local wine industry, to increase the competitiveness of local wineries, and accelerate the growth of the Nova Scotia industry\textsuperscript{528}. This evidence confirms that the Policy, despite appearing to be origin neutral on paper, was created and designed to afford protection to the local wine industry through the granting of a lower mark-up to domestic Nova Scotia wine. The NSLC itself identifies that the Policy was introduced following a study that "clearly indicated that it was imperative for the NSLC to provide a better mark-up for Nova Scotia wines"\textsuperscript{529} and has repeatedly characterised the reduced mark-up as a "preferential" mark-up for domestic wine\textsuperscript{530}. This evidence confirms Australia's above analysis that the reduced


\textsuperscript{524} See Section III.C.1 of this Submission.


\textsuperscript{527} See Section III.C.1 of this Submission.

\textsuperscript{528} Ibid.


\textsuperscript{530} See Section III.C.1 of this Submission.
mark-up through the Policy discriminates against imported wines in breach of Article III:2, first sentence.

(d) Conclusion

294. Australia has demonstrated that the Emerging Wine Regions Policy grants a significantly lower mark-up to all domestic Nova Scotia wine as compared to the higher mark-up applied to like imported wine. The mark-up is an internal charge within the scope of Article III:2, first sentence. The mark-up on imported wine is "in excess" of the mark-up on domestic Nova Scotia wine. Accordingly, the mark-up on Nova Scotian wine violates Article III:2, first sentence of the GATT 1994. The Policy operates, and was intended to operate, to provide a competitive advantage to Nova Scotian wine. The evidence also demonstrates that the very reason for the adoption of the Policy was to afford protection to the domestic wine industry in Nova Scotia. This is the very type of measure that Article III:2, first sentence was designed to prohibit and goes against the "broad and fundamental purpose of Article III … to avoid protectionism in the application of internal tax and regulatory measures"531.

2. The Nova Scotia reduced product mark-up is inconsistent with Article III:4 of the GATT

295. Australia’s primary contention, set out in the preceding section, is that the product mark-ups are an internal charge within the scope of Article III:2, first sentence that violate that article. However, if the Panel finds the Nova Scotia product mark-ups are not within scope of Article III:2 or are not inconsistent with Article III:2 first sentence, Australia alternatively submits that Canada has breached Article III:4 of the GATT 1994. As set out in section IV.C.1, three elements must be satisfied to establish a violation of Article III:4. The following subsections outline how the reduced product mark-up satisfies this test.

(a) The Nova Scotia product mark-ups are laws, regulations or requirements affecting the internal sale, offering for sale and purchase of wine in Nova Scotia

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531 Appellate Body Report, Japan – Alcoholic Beverages, p. 16.
296. The NSLC is a Crown corporation, established under legislation. The NSLC derives its authority to set liquor pricing, including to set product mark-ups, from legislation. Australia recalls that the \textit{Liquor Control Act} gives the NSLC the authority to set liquor pricing in Nova Scotia\textsuperscript{532}. The NSLC Regulations expressly provide that the liquor pricing set by the NSLC includes mark-ups as determined by the NSLC, and provide the NSLC the authority to make policies to carry out its operation under the Act and Regulations\textsuperscript{533}.

297. The NSLC has adopted the Emerging Wine Regions Policy under legislative authority as part of its powers to set mandatory liquor pricing. This Policy prescribes a lower mark-up to retail price of 43\% for wines from an emerging wine region, while the NSLC prescribes a higher mark-up of 140\% for other wines and 120\% for wine bottled in Nova Scotia respectively. As the NSLC mark-up policy has been adopted under legislative authority, and the mark-ups are mandatory, the Emerging Wine Regions Policy is clearly a law, regulation or requirement within the scope of Article III:4.

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

\begin{itemize}
\item[(b)] Domestic Nova Scotia wine and imported Australian bottled wine are "like products"
\end{itemize}

299. It has already been established that domestic and imported Australian wine are like products in the preceding section\textsuperscript{534}. For the same reasons discussed in that section, domestic Nova Scotia wine and imported Australian wine are "like" for the purposes of Article III:4\textsuperscript{535}.

\begin{itemize}
\item[(c)] The Nova Scotia product mark-ups accord less favourable treatment to imported Australian wine than to "like" domestic wine
\end{itemize}

\textsuperscript{532} See Section III.C.1 of this Submission.
\textsuperscript{533} Ibid.
\textsuperscript{534} See section IV.D.1(b) of this Submission.
\textsuperscript{535} The Appellate Body has found that the scope of "like" in Article III:4 is broader than the scope of "like" in Article III:2, first sentence: Appellate Body Report, \textit{EC – Asbestos}, para. 99.
300. As set out in section IV.C.1(c) treatment no less favourable requires an examination of whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products. In the first instance, this involves an assessment based on the design, structure and expected operation of the measure. This assessment need not be based on actual trade effects of the measure in the market. The Appellate Body has found 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.

301. Australia also recalls that Article III:4 provides that "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 the like domestic products. Therefore, for the "treatment no less favourable" analysis in Article III:4, it is the treatment accorded to the like products imported from the complaining Member that is to be compared to the treatment accorded to the ("most-favoured") like domestic products. In this case, the treatment provided to like Australian bottled wine must be compared to the treatment provided to the ("most-favoured") like domestic wine.

302. As set out in the preceding section, domestic Nova Scotia wine is afforded a reduced mark-up rate of 43% through the Emerging Wine Regions Policy. The Policy grants a 43% markup to wines that come from an "emerging wine region" as defined in the Policy. The Policy adopts a wine production criteria for qualification as an "emerging wine region" that requires that: total annual production of wine within the political boundaries (state, province, or equivalent) of the region does not exceed 50,000HL annually.

303. As set out in the preceding section IV.D.1(c) this criteria, through its design and operation, grants all domestic Nova Scotia wines this lower mark-up. Nova Scotia produces less wine in the aggregate than 50,000HL annually. A Nova Scotia government press release from 2015 notes that Nova Scotia wineries produce about 1.8 million litres of wine annually, well below the Policy.

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536 Appellate Body Reports, Korea – Various Measures on Beef, para. 137; EC – Seal Products, para. 5.101; Dominican Republic – Import and Sale of Cigarettes, para. 93; and US – Clove Cigarettes, para. 179.

537 Appellate Body Report, Dominican Republic – Import and Sale of Cigarettes, para. 93.

538 See section IV.A.3 of this Submission.

539 This was recognised in the context of Article 2.1 of the TBT Agreement in Appellate Body Report, US – Clove Cigarettes, para. 190.
threshold\textsuperscript{540}. As Nova Scotia meets the emerging wine region criteria in the Policy, all domestic Nova Scotia wine qualifies for the reduced mark-up. The evidence also establishes that in fact all domestic wine is granted the reduced mark-up\textsuperscript{541}.

304. In contrast, as already demonstrated above, the wine production criteria in the Policy by design in fact excludes virtually all Australian wine from qualifying under the Policy\textsuperscript{542}. This is because only 2 Australian wine regions in Queensland (of 65) could theoretically qualify under the Policy, and exports from those regions to Nova Scotia are miniscule (if indeed any, noting that data indicates that only 120,000 litres of wine from Queensland was exported to Canada in 2018).\textsuperscript{543} Moreover 92\% of all wine that Australia produces is from regions that produce more than 50,000HL annually. The vast majority of Australia's wine exports to Canada come from jurisdictions that are not eligible to qualify under the Policy because annual production in those jurisdictions is more than 50,000HL annually. Therefore, virtually all like Australian wine imported to Nova Scotia would not be eligible for the 43\% markup under the Policy\textsuperscript{544}. In contrast, all like domestic wine is granted the 43\% mark-up.

305. The reduced mark-up afforded to domestic Nova Scotia wines through the Policy modifies the conditions of competition to the detriment of imported wine in the Nova Scotia market. As a mark-up is applied to the price of the wine for retail sale, it ultimately affects the retail price of the wine. Therefore, a reduced mark-up could allow a domestic wine to be more affordably priced than an imported wine that is subject to a higher mark-up. In accordance with basic economic principles, as price has an impact on demand, domestic wine that is priced more affordably can be expected to be more competitive in the market, increase consumer demand and generate more sales of that wine.

306. The Policy itself identifies this expected competitive advantage to domestic wine as a result of a lower mark-up. It identifies that the reason for the reduced mark-up rate is to "allow[s] them [wines from emerging regions] to be competitively priced to encourage consumer trial and


\textsuperscript{541} See Section III.C.1 of this Submission.

\textsuperscript{542} See Section IV.D.1(c) of this Submission.

\textsuperscript{543} See Section IV.D.1(c) of this Submission.

\textsuperscript{544} Ibid.
acceptance", and "[t]o provide the ability for Nova Scotia consumers to have access to wine from emerging regions at competitive prices"\textsuperscript{545}. The study which prompted the adoption of the Policy also references this expected competitive advantage to the domestic wine industry "[i]t is anticipated with this change in the mark-up policy will accelerate the growth of the Nova Scotia industry"\textsuperscript{546}.

307. Indeed, the NSLC itself has on numerous times highlighted the impact on competitive conditions the Policy is expected to have in the market in favour of domestic wine. The NSLC noted, soon after the adoption of the new Policy, that it would "...accelerate the growth of this rapidly developing industry in our province. This policy will aid our excellent local wineries to compete against their international counterparts within our own market and within our NSLC stores"\textsuperscript{547}. The NSLC 2009-2010 Annual Report also noted that as a result of the Policy "[w]ineries can now sell their products in NSLC stores with higher profit margins, allowing them to re-invest in their businesses, be more competitive."\textsuperscript{548} In the NSLC 2014-15 Annual Report under the heading "Industry support" it notes the retail support given to the local industry: "[p]rovide local products with a reduced mark-up so they can better compete on price with large competitors"\textsuperscript{549}.

308. This evidence demonstrates that the reduced mark-up for domestic wine effected through the Policy can be expected to adversely modify the conditions of competition in the market to the detriment of like imported Australian wine, which as demonstrated above, is subject to a higher mark-up. It demonstrates that the reduced mark-up granted to the like domestic Nova Scotia wines can be expected to reduce the retail price of the wine, making the wine more competitive, driving consumer demand for Nova Scotia wine and increasing domestic wine sales and market share. This competitive advantage is not afforded to like imported wine subject to a significantly higher 140% mark-up. Accordingly, Australia has demonstrated that the design, application and expected operation of the Policy affords less favourable treatment to imported wine than that afforded to domestic Nova Scotia wine in breach of Article III:4.

\textsuperscript{545} Emerging Wine Regions Policy, Exhibit AUS-65, p. 1.
309. While it is not necessary to show actual trade effects of a contested measure to establish a violation of Article III:4, such evidence can assist with confirming the impact of a measure on competitive opportunities. There is evidence that the reduced mark-up has indeed had precisely the intended impact on competitive opportunities in the market in favour of domestic wine. Since the introduction of the Policy, Nova Scotian wine sales have steadily increased as has their market share over imported wines.

310. By 2013-2014, sales of Nova Scotia wine had increased by 137% since 2008 and by 2014-2015 sales of Nova Scotia wines were surpassing imported wine sales from major foreign competitors France, Chile and Australia. The NSLC has explicitly recognized that the reduced mark-up has contributed to growth in the local wine industry and domestic wine sales. The original study which prompted the change in mark-up policy identified that "it was imperative for the NSLC to provide a better mark-up for Nova Scotia wines" and "without the assistance of the NSLC, via a change in the mark-up policy" the domestic wine industry would only achieve modest growth, whereas the "anticipated…change in the mark-up policy will accelerate the growth of the Nova Scotia industry." The NSLC did adopt a reduced mark-up for local wine through the Policy, and as anticipated the Nova Scotia wine industry grew. This is no coincidence: the reduced mark-up granted to domestic wines has had precisely the intended competitive advantage to domestic wine.

311. A 2016 media report directly attributes growth in sales of domestic wine to the reduced mark-up granted via the Policy: "[l]ocal wine sales were up 14.7 per cent in the last quarter of 2015, compared to the same three-month period in 2014….The steady growth in sales has followed the introduction of the emerging wine regions policy in 2007. The policy mandates favourable markups for all local products sold through the NSLC.

551 See paragraph 110 of this Submission.
552 NSLC Annual Report 2013-2014, Exhibit AUS-75, p. 15; see also evidence exhibited in Section III.C.1 of this Submission.
554 Committee on Public Accounts - NSLC, Exhibit AUS-73, pp. 26-27, extracted at paragraph 106 of this Submission.
556 As Nova Scotia wine industry grows, so does shelf space in stores, Exhibit AUS-72, p. 2.
312. This evidence of the impact of the measure on domestic wine sales confirms that the Policy has provided a competitive advantage to Nova Scotian wines. As demonstrated above, because virtually all like Australian wines cannot access the reduced mark-up, this same competitive advantage is not afforded to like imported wine.

(d) Conclusion

313. For the reasons outlined above, the reduced mark-up afforded to Nova Scotia wine through the Emerging Wine Regions Policy breaches Article III:4. While the Policy appears to apply a reduced mark-up based on whether wine is from an "emerging wine region", Australia has demonstrated that in fact the design, application and operation of the Policy affords like imported wine less favourable treatment than domestic wine, by providing a reduced mark-up of 43% to domestic wine while like imported wine is subject to a higher mark-up of 140%. Moreover, there is ample evidence to show that the very reason the Policy was adopted by the NSLC was to afford protection to the production of domestic wine by provision of a preferential mark-up.

V. CONCLUSION

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


b. The Ontario wine basic tax is inconsistent with Article III:2, first sentence of the GATT 1994.

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

d. The Quebec grocery measures are inconsistent with Article III:4 of the GATT 1994.

e. The Nova Scotia reduced product mark-up for local producers is inconsistent with Article III:2, first sentence of the GATT 1994, or alternatively Article III:4 of the GATT.
Australia requests that the Panel recommend to the Dispute Settlement Body that it request Canada bring its measures into conformity with its obligations under the GATT 1994.