CANADA – MEASURES GOVERNING THE SALE OF WINE
(DS537)

THIRD PARTY ORAL STATEMENT
OF THE UNITED STATES OF AMERICA

July 19, 2019

TABLE OF REPORTS

Short Form	**Full Citation**
Brazil – Internal Taxes	Working Party Report, *Brazilian Internal Taxes*, GATT/CP.3/42 (First Report), adopted 30 June 1949, BISD II/181; GATT/CP.5/37 (Second Report), adopted 13 December 1950, BISD II/186
Japan – Alcoholic Beverages II (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
Thailand – Cigarettes (Philippines) (AB)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011
Thailand – Cigarettes (Philippines) (Panel)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R
US – Superfund	GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, L/6175, adopted 17 June 1987, BISD 34S/136

Mr. Chairman, members of the Panel:

1. Thank you for this opportunity to present the views of the United States. The United States is participating as a third party in this dispute because of its systemic interest in the proper interpretation of the covered agreements, and also because the United States has a substantial commercial interest as a major exporter of wine to Canada. The claims Australia has presented concern the fundamental principle of national treatment, an obligation that Canada owes to all Members of the WTO, not just to Australia.

2. In this statement, the United States will briefly address several issues concerning Articles III:2 and III:4 of the GATT 1994,[1] and we will also touch on the relevance and interpretation of Article XVII of the GATT 1994.

I. The Proper Interpretation of the First Sentence of Article III:2 of the GATT 1994

3. Australia has alleged that the federal and Ontario tax measures, as well as the Nova Scotia reduced product mark-up measure, result in imports being taxed or charged "in excess of" domestic like products, thus breaching the first sentence of Article III:2 of the GATT 1994.[2]

4. In its first written submission, Canada argued at length that Article III:2 "requires consideration of a measure's economic impact on competitive opportunities."[3] Canada reiterated in its opening statement during this meeting that "preserving the link between Article III:1 and Article III:2, first sentence requires, at a minimum, that a responding party be given the opportunity to rebut the presumption that taxing an imported product in excess of the like

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[1] *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

[2] *See* First Written Submission of Australia (May 10, 2019) ("Australia's First Written Submission"), paras. 120-146, 168-179, 264-294.

[3] *See* First Written Submission of Canada (June 14, 2019) ("Canada's First Written Submission"), paras. 294-319, 332-338.

domestic product in fact results in protection being afforded to domestic production."[4] Canada is incorrect.

5. The United States has addressed this in the U.S. third party written submission.[5] Nothing in the terms of the first sentence of Article III:2 or in Article III:1 suggests the connection for which Canada argues, in which an <u>additional element</u> must be proved to make out a claim under the first sentence of Article III:2, namely that the taxing or charging "in excess" <u>affords protection</u>.

6. By contrast, the <u>second sentence</u> of Article III:2 does establish such a link to Article III:1, and this has interpretive significance. Under the second sentence, which refers to a party "otherwise apply[ing] internal taxes or charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1," the term "otherwise apply" distinguishes the case under the second sentence from the case under the first sentence. So, under the second sentence, one does not have taxing or charging "in excess of", but still there is some other type of differential treatment. That can be addressed if it is contrary to the principles set forth in Article III:1, so it would be necessary under the second sentence to establish that the tax or charge is applied "so as to afford protection to domestic production." That "afford protection" element would need to be demonstrated, and evidence of that could be rebutted, under the second sentence, because the tax or charge at issue is not "in excess of".

7. The absence of similar terms in the first sentence of Article III:2 linking it to Article III:1 must be given meaning, or the terms in the second sentence would be rendered redundant or

[4] Oral Statement of Canada at the First Substantive Meeting of the Panel (July 18, 2019) ("Canada's First Opening Statement"), para. 14.
[5] *See* Third Party Written Submission of the United States of America (June 28, 2019) ("U.S. Third Party Written Submission"), paras. 6-11.

inutile, contrary to customary rules of interpretation.[6] Thus, it cannot be a defense to a claim under the first sentence of Article III:2 to argue – or even to establish definitively – that the excess taxation does not afford protection according to some analysis of data. Instead, if an internal tax or charge applied to imported products is found to be "in excess of" that which is applied to like domestic products, and the respondent cannot rebut the evidence demonstrating that such an internal tax or charge is applied "in excess of", then the inquiry ends for purposes of the first sentence of Article III:2.

8. GATT and WTO reports have affirmed consistently for decades that no consideration of a measure's economic impact on competitive opportunities is required under the first sentence of Article III:2.[7] The Appellate Body reinforced this point in *Japan – Alcoholic Beverages II.* With respect to the amount of "excess" under Article III:2, the Appellate Body reasoned that "even the smallest amount of 'excess' is too much." The Appellate Body further found that "the prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a 'trade effects test' nor is it qualified by a *de minimis* standard."[8] As Canada characterizes it, the Appellate Body found that the omission from the first sentence of Article III:2 of any reference to Article III:1 "signifie[s] that internal taxes or other internal charges imposed on imported products that are in excess of such taxes or charges when imposed on like domestic products, are deemed to afford protection".[9]

9. Canada calls into question the Appellate Body's findings in *Japan – Alcoholic Beverages II*, contending that "the conclusion drawn by the Appellate Body is not persuasive, and merits

[6] *See Japan – Alcoholic Beverages II (AB)*, p. 12.
[7] *See*, *e.g.*, *Brazil – Internal Taxes*, GATT/CP.3/42 - II/181, para. 16; *US – Superfund*, L/6175 - 34S/136, para. 5.1.9
[8] *Japan – Alcoholic Beverages II (AB)*, p. 23.
[9] Canada's First Opening Statement, para. 13.

reconsideration".[10] Canada has every right to make such an argument. The DSU[11] does not assign precedential value to panel or Appellate Body reports adopted by the DSB,[12] or interpretations contained in those reports, in the sense of an interpretation that must be followed in a subsequent dispute.

10. Instead, the DSU and the WTO Agreement reserve such weight to authoritative interpretations adopted by WTO Members in a different body – the Ministerial Conference or General Council – acting not by negative consensus but under different procedures. The DSU explicitly provides in Article 3.9 that the dispute settlement system operates without prejudice to this interpretative authority. The DSU states that it exists to resolve disputes arising <u>under the covered agreements</u>[13] – not disputes concerning panel or Appellate Body interpretations of those agreements. The DSU also provides that a panel or the Appellate Body is to apply customary rules of interpretation of public international law in assisting the DSB to determine whether a measure is inconsistent with a Member's commitments under the covered agreements.[14] Those customary rules of interpretation likewise do not assign a precedential value to interpretations given as part of dispute settlement for purposes of discerning the meaning of agreement text.

11. Canada suggests that, "[w]here Canada parts ways with the Appellate Body, it does so for cogent reasons."[15] Canada goes on to provide its reasons, which, ultimately, amount to Canada disagreeing with the Appellate Body's interpretation.[16] The United States welcomes Canada's acknowledgement that disagreement, on the basis of a different interpretation resulting from application of customary rules of interpretation to the text of the WTO agreements, is a valid

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[10] Canada's First Opening Statement, para. 14.
[11] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").
[12] Dispute Settlement Body ("DSB").
[13] DSU, Art. 1.
[14] DSU, Arts. 3.2, 7.1.
[15] Canada's First Opening Statement, para. 14.
[16] *See* Canada's First Opening Statement, para. 14.

reason to reach an interpretive conclusion that differs from that reached in an earlier Appellate Body report.

12. One would expect that Canada would take the position it is espousing in this dispute consistently in all disputes and in the context of all discussions concerning the DSU. The United States is quite concerned, however, that Canada has very recently expressed the opposite view in another ongoing dispute, even going so far as to argue that a panel acted inconsistently with Article 11 of the DSU by disagreeing with prior Appellate Body findings because the panel considered those findings to be incorrect.[17] It is troubling that a Member would simultaneously take such inconsistent and self-serving positions in different disputes, particularly without disclosing to the adjudicators that it is doing so. This can only serve to undermine the credibility of the WTO dispute settlement system.

II. The Interpretation and Application of Article III:4 of the GATT 1994

13. Turning back to the substance of this dispute, as explained in the U.S. third party written submission,[18] Article III:4 of the GATT 1994 does not require a demonstration of the current, "actual effects of the measure at issue in the internal market of the Member concerned."[19] Because a demonstration of "actual effects" is not required, then establishing the "potential effects,"[20] discernible from the "design, structure, and expected operation of the measure,"[21] could satisfy the requirements for a successful *de facto* claim under Article III:4.

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[17] *See United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber Products from Canada* (AB-2019-3/DS534), Appellee Submission of the United States of America (June 24, 2019), paras. 14-90 (responding to Canada's claim that the panel in that dispute acted inconsistently with Article 11 of the DSU) (available at https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-dispute-37).

[18] *See* U.S. Third Party Written Submission, paras. 21-26.

[19] *Thailand – Cigarettes (Philippines) (AB)*, para. 134.

[20] *Thailand – Cigarettes (Philippines) (Panel),* para. 7.730.

[21] *Thailand – Cigarettes (Philippines) (AB)*, para. 134.

14. In its opening statement, Canada indicated that it "agrees" that "it is not necessary, as a matter of making out a *prima facie* case, for the complaining party to show actual trade effects."[22] Canada contends, though, that this "does not mean that actual effects, or the absence thereof, are irrelevant considerations."[23] Canada suggests that "evidence of actual effects may be taken into account as part of the overall analysis",[24] and the "analysis under Article III:4 goes beyond looking at the design, structure and expected operation of the measure, and should include consideration of market conditions and other extrinsic circumstances."[25] Canada's position is unobjectionable as far as it goes.

15. But Canada's proposed approach raises questions like: how are data on trade flows to be taken into account as purported "evidence of actual effects"? and what are the implications of any changes – or the absence of any changes – in trade flows? As Australia astutely observed in its opening statement, "if imports have increased in a market, this does not preclude a finding that the conditions of competition have been affected because imports could have increased more absent the measure."[26]

16. Canada's approach would appear to necessitate a kind of rather complicated counterfactual analysis, in which one would assess what the trade flows would have been but for the challenged measure. Under such an analysis, if it were even possible to do, one might conclude that the trade flows would have been X <u>for reasons</u>. That "<u>for reasons</u>" part is actually the critical part of the analysis in terms of understanding whether the measure changed the conditions of competition – and perhaps whether the measure did or did not have (*i.e.*, cause)

[22] Canada's First Opening Statement, para. 23.
[23] Canada's First Opening Statement, para. 23.
[24] Canada's First Opening Statement, para. 23.
[25] Canada's First Opening Statement, para. 24.
[26] Oral Statement of Australia at the First Substantive Meeting with the Parties (July 18, 2019) ("Australia's First Opening Statement"), para. 68.

actual effects. But, if one knows the reasons, one does not need to actually look at the trade flows, and if one has data on trade flows but does not know the reasons, then one cannot make any conclusions about any so-called "actual effects" of the measure. In that case, application of logic and reason when scrutinizing the structure, design, and expected operation of the measure, while, of course, taking into account all other information and evidence, including trade data, is what is needed to reach a conclusion about whether a measure has changed the conditions of competition to the detriment of imports.

17. Ultimately, a panel must assess facially origin-neutral measures that draw distinctions among like products on a case-by-case basis, taking into account the structure, design, and expected operation of the measure along with any other relevant evidence or information that would bear on the question of whether the measure does or does not accord to imports treatment no less favorable than that accorded to domestic products. In many cases, this analysis likely will be rather difficult and complex, but that is the challenging task that the parties have set before the Panel.

III. Observations Regarding Article XVII of the GATT 1994

18. Finally, the United States recalls that Australia has made claims under Article III of the GATT 1994 concerning the Emerging Wine Regions Policy ("EWRP") promulgated and put into effect by the Nova Scotia Liquor Corporation ("NSLC"). Accordingly, in the first place, it would be appropriate for the Panel to examine whether Australia has established that the challenged measure constitutes an internal tax or other internal charge under Article III:2 and/or whether the measure constitutes a law, regulation, or requirement under Article III:4. It may also be necessary for the Panel to assess whether the measure is attributable to the government of Nova Scotia, given that the NSLC is not an organ of government but is instead a government-

owned corporation that evidently has legislative and regulatory authority and serves as the regulator of alcoholic beverages in the province.

19. Canada has invoked Article XVII of the GATT 1994 and contends that Australia's claim against the EWRP must be made under Article XVII because the NSLC is a state trading enterprise ("STE") and "retail mark-ups [are] a commercial practice of an STE related to buying and selling wine rather than a governmental measure."[27] Article XVII, though, does not refer so broadly to actions "related to buying and selling".[28] Rather, Article XVII more narrowly prescribes that an STE "shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders",[29] and, further, STEs "shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations…."[30] The reference to "import mark-up[s]" in Article XVII:4(b) likewise is rather narrow and relates to an obligation to provide information about such mark-ups.

20. Furthermore, Canada has agreed that STEs may be subject to Article III of the GATT 1994, or to any other disciplines of the GATT 1994 or other covered agreements.[31] This may be the case when an STE is doing something other than engaging in "its purchases or sales involving either imports or exports",[32] and Canada suggests that it will be the case "when an STE acts to perform a government function, or exercise governmental authority".[33]

[27] Canada's First Opening Statement, para. 29.
[28] Canada's First Opening Statement, para. 29.
[29] GATT 1994, Art. XVII:1(a).
[30] GATT 1994, Art. XVII:1(b).
[31] Canada's First Written Submission, para. 243.
[32] GATT 1994, Art. XVII:1(a). *See also* GATT 1994, Art. XVII:1(b).
[33] Canada's First Written Submission, para. 243.

21. Canada proposes a test under which "when an STE acts in fulfilment of a private market commercial function, such as marking up a product on resale, sufficient to cover acquisition costs, selling, general and administrative costs, and an amount for profit, those actions are subject only to Article XVII of the GATT 1994." It is not clear, though, that the EWRP even passes Canada's own test.

22. First, the NSLC evidently is not merely a liquor store. Australia has put before the panel evidence that the NSLC is the provincial regulator of beverage alcohol. The NSLC has a legal mandate to make and implement governmental policy, including a policy of supporting local producers.[34] So, rather than just being a liquor store, the NSLC is a kind of chimera that serves different purposes at different times.

23. Second, in promulgating the EWRP, the NSLC did something aside from, or more than, or perhaps even disconnected from simply "marking up a product on resale, sufficient to cover [costs and profit]".[35] A stated purpose of the policy is to support Nova Scotia wine producers.[36] The Panel should take that into account. The Panel may also want to inquire why the sufficiency of a mark-up for covering costs and profit would vary depending on whether or not the wine comes from an emerging wine region. The reason is not immediately clear.

24. Finally, Canada's suggestion that such actions "are subject <u>only</u> to Article XVII of the GATT 1994" raises some concern. Canada points to nothing in the text of Articles III or XVII that would necessitate such a compartmentalization of measures and claims. Given the link in Article XVII to the principles of Article III, Article XVII reads more like an additional attempt

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[34] *See*, *e.g.*, Australia's First Written Submission, paras. 22, 36-37.
[35] Canada's First Written Submission, para. 243.
[36] *See*, *e.g.*, Australia's First Written Submission, paras. 22, 101-108.

by Members to capture certain specified activity that might not ordinarily be captured already by Article III, rather than broadly removing activity from coverage under Article III.

25. The key to the analysis here may be for the Panel to scrutinize the particular measure challenged by Australia, the description of that measure, and the evidence supporting the existence of the measure to determine whether Australia has established the elements of its claims under Article III:2 and/or Article III:4. It may be the case – and Australia has placed before the Panel evidence supporting this conclusion – that the challenged measure does not constitute "purchases or sales involving either imports or exports," and so is something other than the particular conduct referenced in Article XVII:1 of the GATT 1994.

III. Conclusion

26. This concludes the U.S. oral statement. We thank the Panel for its consideration of the views of the United States.