CANADA – MEASURES GOVERNING THE SALE OF WINE
(DS537)

THIRD PARTY WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

June 28, 2019

TABLE OF CONTENTS

TABLE OF REPORTS

Short Form	Full Citation
Brazil – Taxation (AB)	Appellate Body Report, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/AB/R / WT/DS497/AB/R and Add. 1, adopted 11 January 2019
Brazil – Taxation (Panel)	Panel Report, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R / WT/DS497/R / Corr. 1 and Add. 1, adopted 11 January 2019, as modified by Appellate Body Report, WT/DS472/AB/R / WT/DS497/AB/R and Add. 1
Canada – Autos (Panel)	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R
Canada – Periodicals (AB)	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997
China – Publications and Audiovisual Products (Panel)	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R
Dominican Republic – Import and Sale of Cigarettes (AB)	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
EC – Bananas III (AB)	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
EC – Seal Products (AB)	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014

India – Autos (Panel)	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002
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
Korea – Various Measures on Beef (AB)	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
Mexico – Taxes on Soft Drinks (Panel)	Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R
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 – FSC (Article 21.5 – EC II) (AB)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW2, adopted 14 March 2006
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996

I. INTRODUCTION

1. The United States makes this third party submission because of its systemic interest in the correct interpretation and application of the provisions of the covered agreements.

2. Australia asserts that a Canadian federal excise tax exemption and various other measures taken by the provinces of Ontario, Quebec, and Nova Scotia breach Articles III:2 and III:4 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").[1] Canada contends that Australia has misconstrued the legal standards for establishing breaches of Articles III:2 and III:4 of the GATT 1994, and that Australia has failed to show "actual effects" to prove its claims of discrimination under Article III:4 of the GATT 1994.[2]

II. INTERPRETATION AND APPLICATION OF THE FIRST SENTENCE OF ARTICLE III:2 OF THE GATT 1994

3. With respect to the federal and Ontario tax measures and the Nova Scotia reduced product mark-up measure, Australia alleges that the measures result in imports being taxed or charged in excess of domestic products, contrary to the first sentence of Article III:2 of the GATT 1994.[3]

4. The first sentence of Article III:2 of the GATT 1994 provides:

> The products of the territory of any Member imported into the territory of any other Member shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

5. Determining whether an internal tax or charge is inconsistent with the first sentence of Article III:2 of the GATT 1994 is a two-step process. First, the imported and domestic products at issue must be "like." Second, the internal tax or charge must be applied to imported products "in excess of" those applied to the like domestic products.[4] As the Appellate Body reasoned in

---

[1] *See, e.g.*, First Written Submission of Australia (May 10, 2019) ("Australia's First Written Submission"), paras. 131-313.
[2] *See, e.g.*, First Written Submission of Canada (June 14, 2019) ("Canada's First Written Submission") paras. 108-154, 209-210, para. 216
[3] *See, e.g.*, Australia's First Written Submission, paras. 120-146, 168-179, 264-294.
[4] *See Japan – Alcoholic Beverages II (AB)*, section H.l.

Japan – Alcoholic Beverages II, "[i]f the imported and domestic products are 'like products', and if the taxes applied to the imported products are 'in excess of' those applied to the like domestic products, the measure is inconsistent with Article III:2, first sentence."[5]

6. Canada explains that it "is not contesting 'likeness' with respect to any of Australia's claims."[6] Rather, Canada contends that "the Appellate Body's conclusion [in *Japan – Alcoholic Beverages II*] that a tax on an imported product that is 'in excess' of the tax on the like domestic product must be 'deemed' to afford protection to domestic production should not be interpreted as a mechanical calculation automatically resulting in a violation, but a conclusion to be drawn unless it could be demonstrated otherwise."[7] Canada emphasizes that, "[s]imilar to the question in Article III:4 whether differential treatment results in less favourable treatment, the critical issue is whether the difference in taxation levels affects the conditions of competition."[8] Canada is incorrect, and Canada's arguments are beside the point.

7. Canada fails to focus on the text of the first sentence of Article III:2 of the GATT 1994 – the provision under which Australia has brought its claims against the federal and Ontario tax measures, as well as the Nova Scotia reduced product mark-up measure.[9] Instead, Canada appears to argue that analytical frameworks elaborated in prior dispute settlement reports to assess claims under Article III:4 of the GATT 1994 should also be used when assessing Australia's claims under the first sentence of Article III:2 of the GATT 1994. However, while Article III:4 of the GATT 1994 requires that imports be accorded "treatment no less favourable" than that accorded to like domestic products, the term "treatment no less favourable" – which is the textual basis for conducting a conditions of competition analysis under Article III:4 – is absent from the first sentence of Article III:2 of the GATT 1994. Because the term "treatment no less favourable" is absent from the first sentence of Article III:2, it is unnecessary to establish that differential taxation modifies the conditions of competition to find that a measure is inconsistent with the first sentence of Article III:2.

[5] *Japan – Alcoholic Beverages II (AB)*, pp. 19-20; s*ee also Canada – Periodicals (AB)*, p. 19.
[6] Canada's First Written Submission, para. 146.
[7] Canada's First Written Submission, para. 141.
[8] Canada's First Written Submission, para. 142 (underline in original).
[9] *See* Australia's First Written Submission, paras. 146, 179, 294.

8. Moreover, the first sentence of Article III:2 does not contemplate a "trade effects test."[10] 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," then the inquiry ends for purposes of the first sentence of Article III:2.

9. Canada disputes this straightforward interpretation of the plain text of the first sentence of Article III:2 of the GATT 1994.[11] Canada "submits that preserving the link between Article III:2, first sentence and Article III:1 requires that a responding party be given an opportunity to rebut the presumption that taxing an imported product 'in excess' of the like domestic product results in protection being afforded to domestic production."[12] Canada further contends that, under its own novel theory, Article III:2 "requires consideration of a measure's economic impact on competitive opportunities," and then Canada faults Australia for not providing any evidence of any economic impact.[13] Canada invents a test out of thin air, and then chides Australia for, "in effect, asking the Panel to perform the analysis that, as the complainant, Australia itself was obligated to demonstrate but which it has failed to do."[14]

10. Canada's defense is entirely beside the point. As Canada itself acknowledges, "the words 'in excess' connote an empirical fact but the words 'afford protection' describe a consequence or outcome that cannot be said, in an empirical sense, to be foregone."[15] Of course, the term "in excess" appears in the first sentence of Article III:2 of the GATT 1994 – the provision under which Australia has brought claims – while the term "afford protection" does not. Thus, establishing whether Australia has proven its claim is, in Canada's words, a matter of "empirical fact".[16] The Panel should not countenance Canada's attempt to muddle the various provisions of Article III of the GATT 1994.

11. The weakness of Canada's argument is revealed by the terminology Canada uses in mounting its defense. Canada asserts that the interpretation of Article III:2 is "coloured by

[10] *See Japan – Alcoholic Beverages II (AB)*, p. 23.
[11] *See* Canada's First Written Submission, paras. 130-143.
[12] Canada's First Written Submission, para. 143.
[13] Canada's First Written Submission, para. 332.
[14] Canada's First Written Submission, para. 335.
[15] Canada's First Written Submission, para. 142.
[16] Canada's First Written Submission, para. 142.

Article III:1",[17] that the terminology of Article III:1 "implies that for a measure to 'afford protection' it must actually affect the competitive relationship between products",[18] and that "the overall purpose of Article III is to ensure that measures are not applied to imported or domestic products so as to afford protection to domestic production and that this general principle informs the rest of Article III".[19] None of Canada's general observations relate to – nor do they alter – the particular terms that actually are present in the first sentence of Article III:2 of the GATT 1994. Canada simply is attempting to complicate what is ultimately an "empirical"[20] question: Are the alleged internal taxes or charges applied to imports "in excess" of those applied to like domestic products?[21] Rather than impose an additional *condition* for a claim under Article III:2, the context of Article III:1 ("should not be applied … so as to afford protection") suggests that the straightforward obligation of Article III:2 ("shall not be subject … in excess of") is a situation in which protection is afforded.[22] All of Canada's discussion of whether the alleged internal taxes or charges "afford protection" as a separate inquiry is irrelevant to the Panel's disposition of Australia's claims under the first sentence of Article III:2 of the GATT 1994. If Canada has direct evidence that its measures do not impose internal taxes or charges on imports "in excess of" like domestic products, Canada should rebut Australia's case by presenting that evidence.

12. Australia alleges that Canada exempts packaged wine produced from 100 percent Canadian ingredients from a federal excise duty,[23] that the Ontario wine basic tax imposes a differential tax structure based on the origin of ingredients,[24] and that Nova Scotia applies reduced product mark-ups to domestic Nova Scotia wine compared to imports of Australian wine resulting in a discriminatory internal charge.[25] Australia argues that this dispute is analogous to the dispute *Mexico – Taxes on Soft Drinks.*[26]

[17] Canada's First Written Submission, para. 130 (underline added).
[18] Canada's First Written Submission, para. 128 (underline added).
[19] Canada's First Written Submission, para. 140 (underline added).
[20] Canada's First Written Submission, para. 142.
[21] GATT 1994, Art. III:2, first sentence.
[22] In this regard, the second sentence of Article III:2 directs that "no Member shall *otherwise* apply" a charge "in a manner contrary to the principles set out in paragraph 1", confirming that a tax or charge that breaches the first sentence of Article III:2 is contrary to those principles.
[23] Australia's First Written Submission, para. 5.
[24] Australia's First Written Submission, para. 168.
[25] Australia's First Written Submission, para. 264.
[26] *See, e.g.*, Australia's First Written Submission, paras. 139, 170, 178.

13. In *Mexico – Taxes on Soft Drinks*, the United States challenged a Mexican tax on soft drinks and syrups that used High Fructose Corn Syrup (HFCS) or any sweetener other than cane sugar. Soft drinks and syrups that used cane sugar were exempt from the tax. HFCS was the main sweetener for U.S. soft drinks and syrups, while cane sugar was the main sweetener used for Mexican soft drinks and syrups. Because the tax exempted domestic soft drinks and syrups sweetened with cane sugar, the tax favored domestic cane sugar production over imports. As a result, the panel in that dispute found that the HFCS soft drink tax was inconsistent with the first sentence of Article III:2 of the GATT 1994.[27]

14. Factually, the United States argued in *Mexico – Taxes on Soft Drinks* that almost all imported products were taxed in excess of like domestic products, and that the only sweetener exempted from the measures (cane sugar) was almost exclusively a domestic product.[28] The panel there found in favor of the United States. In particular, the panel found it significant that, regarding the HFCS soft drink tax: "(a) it is the presence of non-cane sugar sweeteners that provides the trigger for the imposition of the tax; and, (b) the burden of the tax can be expected to fall, at least in part, on the products containing the sweetener, and thereby to fall on the sweetener."[29]

15. With respect to the federal and Ontario tax measures and the Nova Scotia reduced product mark-up measure, if the Panel agrees with the facts as presented by Australia, then the panel findings in *Mexico – Taxes on Soft Drinks* would appear to be highly relevant to the current dispute.

III. INTERPRETATION AND APPLICATION OF ARTICLE III:4 OF THE GATT 1994

16. Australia alleges that the federal excise tax and certain Ontario, Quebec, and Nova Scotia measures accord imported wine products less favorable treatment than domestic wine products, contrary to Article III:4 of the GATT 1994.[30]

17. Article III:4 of the GATT 1994 provides, in relevant part:

> The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less

[27] *See, e.g.*, *Mexico – Taxes on Soft Drinks (Panel)*, paras. 4.5, 4.20.
[28] *Mexico – Taxes on Soft Drinks (Panel)*, para. 8.54.
[29] *Mexico – Taxes on Soft Drinks (Panel)*, para. 8.44.
[30] *See* Australia's First Written Submission, paras. 147-166, 192-263, 295-313.

> 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.

18. Three distinct elements are required to establish a breach of Article III:4 of the GATT 1994: (1) the imported and domestic products are "like products"; (2) the measure is a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of the imported and domestic like products; and (3) the imported product is accorded less favorable treatment than the domestic like product.[31]

19. As noted above, "Canada is not contesting 'likeness' with respect to any of Australia's claims".[32] Whether the measures challenged by Australia constitute laws, regulations, or requirements subject to Article III:4 is a determination for the Panel to make based upon an objective examination of the facts and characteristics of the measures. The United States will not express a view on that question. The United States limits its comments in this submission to the final element of the analysis under Article III:4 of the GATT 1994.

20. The final element of the analysis under Article III:4 of the GATT 1994 concerns whether the measures at issue accord less favorable treatment to imported products than to domestic like products. Prior reports have explained that this is determined "by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products."[33] Such an examination requires a comparative analysis, which establishes the treatment accorded to both imported and domestic products.[34] The analysis also must specify the differences in treatment and indicate why and how there is "less favourable treatment" of imported products.[35] A measure could still be inconsistent with Article III:4 even if unfavorable treatment does not arise in every instance.[36]

21. In *EC – Seal Products*, the Appellate Body explained that a detrimental impact on the conditions of competition for imports constitutes treatment less favorable:

---

[31] *See, e.g., Korea – Various Measures on Beef (AB)*, para. 133.
[32] Canada's First Written Submission, para. 146.
[33] *Korea – Various Measures on Beef (AB)*, para. 137; s*ee also Dominican Republic – Import and Sale of Cigarettes (AB)*, para. 96; *EC – Bananas III (AB)*, paras. 213-214; *Japan – Alcohol (AB)*, pp. 16-17.
[34] *China – Publications and Audiovisual Products (Panel)*, para. 7.1472.
[35] *China – Publications and Audiovisual Products (Panel)*, para. 7.1473
[36] *US – FSC (Article 21.5 – EC II) (AB)*, para. 221.

> [A] determination of whether imported products are treated less favourably than like domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and like domestic products. If the outcome of this assessment is that the measure has a detrimental impact on the conditions of competition for like imported products, then such detrimental impact will amount to treatment that is "less favourable" within the meaning of Article III:4.[37]

22. The Appellate Body emphasized the "implications" of the measure on the conditions of competition, which underscores that 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."[38] Because a demonstration of "actual effects" is not required, then establishing the "potential effects,"[39] discernible from the "design, structure, and expected operation of the measure,"[40] could satisfy the requirements for a successful *de facto* claim under Article III:4. Evidence of such "potential effects" could take many forms, and should be evaluated on a case-by-case basis.

23. Canada attempts to set an unduly high bar for proving a *de facto* claim under Article III:4 by arguing that a complainant must show "actual effects" of discrimination. Canada's position is not supported by the terms of Article III:4 nor by prior reports.

24. Canada relies on the Appellate Body report in *Korea – Various Measures on Beef* for the proposition that "formal separation [of distribution channels], *in and of itself*, does not necessarily compel the conclusion that the treatment accorded to imported beef is less favorable than the treatment accorded to domestic beef."[41] Canada reasons from this that it is "axiomatic that, in each case, the complainant must adduce evidence to demonstrate that the measure at issue has in fact resulted in a change in competitive conditions to the detriment of the imported product."[42] Canada's reasoning is correct, as far as it goes. However, the Appellate Body went on in *Korea – Various Measures on Beef* to find that "[t]he central consequence of the dual retail

[37] *EC – Seal Products (AB)*, para. 5.116.
[38] *Thailand – Cigarettes (Philippines) (AB)*, para. 134.
[39] *Thailand – Cigarettes (Philippines) (Panel)*, para. 7.730.
[40] *Thailand – Cigarettes (Philippines) (AB)*, para. 134.
[41] Canada's First Written Submission, para. 152 (quoting *Korea – Various Measures on Beef (AB)*, para. 144 (italics in original)).
[42] Canada's First Written Submission, para. 154.

system can only be reasonably construed … as the imposition of a drastic reduction of commercial opportunity to reach, and hence to generate sales to, the same consumers served by the traditional retail channels for domestic beef."[43] The Appellate Body emphasized that "the reduction of competitive opportunity through the restriction of access to consumers results from the imposition of the dual retail system."[44] Thus, while a formal difference in treatment may not, in and of itself, be sufficient to establish less favorable treatment, the conclusion that treatment is less favorable can be reached through the application of logic and reasoning, without necessarily, in all cases, having recourse to trade data or economic analysis.

25. Indeed, even if imports maintain significant access to the market of the responding Member – or sales volume and values increases – that does not preclude a finding that imports are being accorded less favorable treatment. In *Korea – Various Measures on Beef*, the Appellate Body reasoned that "[t]he fact that the WTO-consistent quota for beef has, save for two years, been fully utilized does not detract from the lack of equality of competitive conditions entailed by the dual retail system."[45]

26. Canada also relies on the Appellate Body report in *Thailand – Cigarettes (Philippines)* for the proposition that the Article III:4 analysis "may well involve —but does not require—an assessment of the contested measure in the light of evidence regarding the actual effects of that measure in the market."[46] Then Canada appears to mischaracterize the same language, in the next paragraph of Canada's first written submission, arguing that Australia's approach in this dispute "does not accord with the advice of the Appellate Body on the need for evidence of 'actual effects'."[47] But the passage of the Appellate Body report Canada quotes plainly says that an assessment of evidence of actual effects is not required. Canada repeats the error later in its submission when it contends that "Australia is required to demonstrate to the Panel that the EWRP, in its actual effect, accords less favourable treatment to imported wine than to domestic like products."[48] Such a demonstration simply is not required to demonstrate a breach of Article III:4.

[43] *Korea – Various Measures on Beef (AB)*, para. 145.
[44] *Korea – Various Measures on Beef (AB)*, para. 147.
[45] *Korea – Various Measures on Beef (AB)*, para. 147.
[46] Canada's First Written Submission, para. 209.
[47] Canada's First Written Submission, para. 210.
[48] Canada's First Written Submission, para. 265.

27. Canada also overstates the extent to which WTO panels have examined if a measure excludes an imported product from a domestic market. For example, Canada asserts that "previous disputes have involved claims that a measure operates to exclude an imported like product from the importing country's market, either completely or effectively."[49] Canada's view is mistaken, as a measure could operate to provide a disincentive for imports, in a manner that detrimentally affects the conditions of competition, even if the measure does not operate to exclude imports.

28. A measure need only incentivize less favorable treatment of imports compared to domestic products to breach Article III:4 of the GATT 1994. In *Canada – Autos*, for example, Canadian measures conditioned duty-free access for motor vehicles on meeting a Canadian value added threshold.[50] Canada contended that the measures allowed manufacturers to satisfy the value added requirement through Canadian labor costs, as opposed to the use of Canadian auto parts. Canada further argued that, because they did not distinguish in law or in fact between Canadian auto parts and foreign auto parts, the measures did not affect the "internal sale,…or use" of imported products, and did not accord auto part imports "less favorable treatment" within the meaning of Article III:4.[51] The panel in that dispute rejected Canada's argument.[52] Because Canadian auto parts could satisfy the value added requirement while foreign auto parts could not, the measures necessarily conferred an advantage on Canadian auto parts.[53] The measures incentivized manufacturers to use Canadian auto parts over foreign auto parts and therefore affected the competitive conditions between them, causing a breach of Article III:4.[54]

29. A correct reading of Article III:4 of the GATT 1994, along with prior reports and logic, indicates that a nearly infinite variety of scenarios could result in unequal and less favorable treatment of imports. Accordingly, claims under Article III:4 must be examined case by case, taking into account all relevant facts and circumstances. If the Panel, after making an objective assessment of all the facts and arguments presented, agrees with Australia that the challenged measures modify the conditions of competition to the detriment of Australian imports – even

[49] Canada's First Written Submission, para. 183.
[50] *Canada – Autos (Panel)*, paras. 2.2, 10.67-10.68.
[51] *Canada – Autos (Panel)*, para. 10.77.
[52] *Canada – Autos (Panel)*, paras. 10.81-10.83.
[53] *Canada – Autos (Panel)*, paras. 10.82–10.83.
[54] *Canada – Autos (Panel)*, paras. 10.83-10.85.

though a substantial volume of Australian wine continues to be sold in Canada – then the Panel should find that the challenged measures are inconsistent with Article III:4.

IV. RELATIONSHIP BETWEEN THE FIRST SENTENCE OF ARTICLE III:2 OF THE GATT 1994 AND ARTICLE III:4 OF THE GATT 1994

30. Australia argues that the federal tax measure and the Nova Scotia reduced product mark-up measure are inconsistent with the first sentence of Article III:2 of the GATT 1994, and Australia further argues, in the alternative, that these measures are inconsistent with Article III:4 of the GATT 1994.[55] Canada contends that "Australia's characterization of the relationship between Articles III:2 and III:4 disregards the structure and logic of Article III and reflects a misunderstanding of the jurisprudence that has addressed this question."[56] In particular, Canada argues that "different aspects of the same 'measure' – which could also be characterized as distinct, though related measures, may be subject to Article III:2 or Article III:4, but the same aspect of that measure cannot be subject to both obligations at the same time. Fiscal measures are subject to Article III:2…. regulatory measures are subject to Article III:4."[57] Canada misconstrues the relationship between the first sentence of Article III:2 of the GATT 1994 and Article III:4 of the GATT 1994.

31. The first sentence of Article III:2 of the GATT 1994 refers to "internal taxes or other internal charges of any kind." Whether a challenged measure constitutes an internal tax or other internal charge of any kind is a question that a panel must resolve based on the facts, taking into account the nature and the characteristics of the challenged measure. The characterization of the measure by the complainant does not dictate the status of the measure. A panel examining the matter should make an objective assessment of the measure to ascertain its status.[58]

32. Article III:4 of the GATT 1994 applies "in respect of all laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use" of like products. As with the first sentence of Article III:2 of the GATT 1994, to ascertain whether a challenged measure constitutes a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of like products, a

[55] Australia's First Written Submission, para. 116.
[56] Canada's First Written Submission, para. 110.
[57] Canada's First Written Submission, para. 123.
[58] *See Understanding on Rules Governing the Settlement of Disputes* ("DSU"), Art. 11.

panel should make an objective assessment taking into account all relevant facts and characteristics of the challenged measure.[59] Again, the characterization of the measure by the complainant – or the responding Member – does not dictate the status of the measure.

33. Per Article 3.2 of the DSU, the covered agreements are to be interpreted in accordance with customary rules of interpretation of public international law, and Article 31 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") has been recognized as reflecting the general rule of interpretation.[60] In accordance with Article 31 of the Vienna Convention, the terms "laws, regulations and requirements" in Article III:4 of the GATT 1994 are to be given their ordinary meaning in their context and in the light of the treaty's object and purpose.

34. A prior dispute settlement panel has observed that "the phrase 'laws, regulations, or requirements' encompasses a variety of government measures, from mandatory rules which apply across the board to government action that creates voluntary incentives or disincentives."[61] In addition, other prior panels have explained that the term "affecting" in Article III:4 of the GATT 1994 should be interpreted as having a "broad scope of application."[62] In that regard, the panels in *EC – Bananas III*[63] and *India – Autos*[64] both concluded that the word "affecting" covers more than measures which directly regulate or govern the sale of domestic and imported like products.

35. Nothing in the terms of the first sentence of Article III:2 of the GATT 1994 or Article III:4 of the GATT 1994 expressly provides that a particular measure – or a particular aspect of a particular measure – cannot be subject to the requirements of both provisions simultaneously. Given the broad coverage of Article III:4 of the GATT 1994, a measure imposing an internal tax or charge, which unquestionably is subject to Article III:2 of the GATT 1994, might also be subject to Article III:4 of the GATT 1994. A tax measure, for instance, might be a "law[], regulation[], or requirement[]" for purposes of Article III:4 of the GATT 1994. Such a tax measure might also be a "law" that "affects the internal…use" of a product by according

[59] *See* DSU, Art. 11.
[60] *See, e.g., US – Gasoline (AB)*, p. 17.
[61] *China – Publications and Audiovisual Products (Panel)*, para. 7.1512.
[62] *US – FSC (Article 21.5 – EC II) (AB)*, para. 210; *see also India – Autos (Panel)*, para. 7.196; *Canada – Autos (Panel)*, para. 10.80.
[63] *EC – Bananas III (Panel)*, para. 7.175.
[64] *India – Autos (Panel)*, para. 7.196.

advantages on domestic products over imported products. In that case, the facts and characteristics of the measure would establish that the measure is subject to, and could be found to breach, both the first sentence of Article III:2 of the GATT 1994 and also Article III:4 of the GATT 1994.

36. On the other hand, a measure that is subject to Article III:4 of the GATT 1994 because it is a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of like products might not necessarily also be subject to Article III:2 of the GATT 1994 because it might not also be an internal tax or charge. But that is because the scope of coverage of Article III:4 of the GATT 1994 is broader than the scope of coverage of Article III:2 of GATT 1994, and the outcome of the analysis would depend on the facts and characteristics of the challenged measure, rather than as the result of any strict distinction established by the terms of the first sentence of Article III:2 and Article III:4. No such strict distinction is present in the text of those provisions.

37. Canada attempts to buttress its misreading of the first sentence of Article III:2 of the GATT 1994 and Article III:4 of the GATT 1994 by referring to a number of prior panel and Appellate Body reports, including the panel reports in *Mexico – Taxes on Soft Drinks*, *Argentina – Hides and Leather*, and *Brazil – Taxation* and the Appellate Body reports in *Thailand – Cigarettes (Philippines)* and *EC – Asbestos*.[65] Those reports do not support Canada's argument.

38. In *Mexico – Taxes on Soft Drinks*, the United States argued that tax measures were inconsistent with both Articles III:2 and III:4 of the GATT 1994.[66] The panel there asked the parties if a particular order should be followed when assessing the U.S. claims. The United States suggested that the panel could employ the same order used by the United States in its submissions, and start first with Article III:2. As a result, the panel began its analysis with Article III:2.[67] The panel made no determination as to whether Article III:2 and Article III:4 could apply to the same aspect of a given measure.

39. In *Argentina – Hides and Leather* and *Brazil – Taxation*, the complaining parties did not, as Canada itself explains, challenge the same aspect of any particular measure under both the

[65] *See* Canada's First Written Submission, paras. 116-124.
[66] *Mexico – Taxes on Soft Drinks (Panel)*, para. 8.5.
[67] *Mexico – Taxes on Soft Drinks (Panel)*, paras. 8.14-8.15.

first sentence of Article III:2 of the GATT 1994 and Article III:4 of the GATT 1994.[68] Hence, those panels were not called upon to determine whether a particular measure – or a particular aspect of a particular measure – can be inconsistent with both provisions. Those reports are thus inapposite. Likewise, in *Thailand – Cigarettes (Philippines)*, as Canada acknowledges, "[t]he Appellate Body made no findings on the simultaneous application of Articles III:2 and III:4 to the same measure."[69] While these reports support the proposition that different aspects of a given measure might be inconsistent with different provisions of the covered agreements, they say nothing about whether a particular aspect of a given measure might be inconsistent with more than one provision of a covered agreement. That would, in any event, need to be determined on a case-by-case basis taking into account the facts and characteristics of the challenged measure and the provisions under which claims are brought.

40. Finally, Canada's reference to *EC – Asbestos* also does not support Canada's position, and that report certainly does not "directly contradict[] Australia's argument with respect to the overlapping subject matter scope of Articles III:2 and III:4".[70] On the contrary, as Canada itself notes, "the Appellate Body observed that there was not a sharp distinction between fiscal regulation and non-fiscal regulation".[71] The concern raised by the Appellate Body related to the interpretation of the term "like products" in Article III:4 and the terms "like product" and "directly competitive or substitutable" products in Article III:2.[72] The Appellate Body reasoned that those terms should be interpreted harmoniously because the types of measures described in both provisions could be applied to the same products. It does not follow from the Appellate Body's concern about the scope of products that, as Canada suggests, the "subject matter scopes of the two provisions" do not and cannot overlap.[73] And, in any event, as discussed above, such a conclusion is not supported by the terms of the first sentence of Article III:2 of the GATT 1994 and Article III:4 of the GATT 1994.

41. For the reasons given above, Canada is wrong when it contends that "Australia's claim that both provisions [the first sentence of Article III:2 of the GATT 1994 and Article III:4 of the

[68] *See* Canada's First Written Submission, paras. 117, 119.
[69] Canada's First Written Submission, para. 118.
[70] Canada's First Written Submission, para. 121.
[71] Canada's First Written Submission, para. 122.
[72] *See EC – Asbestos (AB)*, para. 99.
[73] Canada's First Written Submission, para. 122.

GATT 1994] apply simultaneously to precisely the same measure – or the identical elements of that measure – is incorrect."[74]

42. Ultimately, though, the Panel may not need to address the issue of the simultaneous application of the first sentence of Article III:2 of the GATT 1994 and Article III:4 of the GATT 1994. Again, "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."[75] Australia emphasizes that "[t]he challenge under Article III:4 is cast as an alternative."[76] The Panel here may find it useful to organize its analysis in the manner proposed by Australia, commencing with Australia's claims under Article III:2 before analyzing the claims under Article III:4, and the Panel might appropriately exercise judicial economy with respect to the Article III:4 claims if it finds the measures inconsistent with Article III:2.[77] In any case, the Panel should make an objective assessment of the alleged measures, taking into account all of the facts and characteristics of the measures, and determine for itself the applicability of and conformity with the cited provisions of the covered agreements.[78]

V. CONCLUSION

43. The United States appreciates the Panel's consideration of the U.S. views on the issues raised in this proceeding.

[74] Canada's First Written Submission, para. 110.
[75] Australia's First Written Submission, para. 116 (underline added).
[76] Australia's First Written Submission, para. 116.
[77] Australia's First Written Submission, para. 116.
[78] *See* DSU, Art. 11.